## Conclusion.

We submit that to decide for the plaintiff in this case would establish a novel doctrine, unsupported by precedent or by sound public policy, and dangerous in enlarging to an incalculable degree the liability of employers. The judgment of the court below should be affirmed.

ENOCH TOTTEN,
WM. HENRY DENNIS,
*Attorneys for Defendant in Error.*

No. 331. 57.

Brief of Champlin & Robson

# SUPREME COURT
OF THE
# UNITED STATES.

Filed Mar. 26, 1897



OCTOBER TERM, 1896.

MICHIGAN LAND AND LUMBER COMPANY, LIMITED,
*Plaintiff in Error,*
vs.
CHARLES A. RUST, SURVIVOR, ETC.,
*Defendant in Error.*

**No. 331.**

*In Error to the United States Circuit Court of Appeals for the Sixth Circuit.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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J. W. CHAMPLIN,
FRANK E. ROBSON,
*Attorneys for Plaintiff in Error.*

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LANSING, MICH.
THOMPSON & VANBUREN, PRINTERS,
1897.

# Supreme Court of the United States.

October Term, 1896.

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| THE MICHIGAN LAND AND LUMBER COMPANY, (Limited,) Plaintiff in Error, vs. CHAS. A. RUST, SURVIVOR, &c., Defendant in Error. | No. 331. |

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

## BRIEF FOR THE PLAINTIFF IN ERROR.

### STATEMENT OF FACTS.

The action is ejectment involving title to the following lands, in the county of Clare, State of Michigan, namely:

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| S. E. | ¼ | of the | S. E. | ¼ | Sec. | 20, | Town 18 N. | Range 3 W. |
| N. W. | ¼ | " | S. W. | ¼ | " | 21, | " | " |
| N. W. | ¼ | " | S. E. | ¼ | " | 22, | " | " |
| N. W. | ¼ | " | N. W. | ¼ | " | 28, | " | " |
| N. | ½ | " | N. E. | ¼ | " | 35. | " | " |

Other descriptions were contained in the declaration, but were stricken out on the trial.

The plaintiff in error claimed title to the lands in fee simple, and during the trial was allowed to amend so as to claim an undivided half in fee.

The defendants pleaded the general issue.

The case was tried before Hon. Henry H. Swan, district judge, with a jury, resulting in a verdict in favor of the defendants under the instructions of the court. After verdict,

and before judgment, defendant Amasa Rust died, and the case was revived against the surviving defendant, Charles A. Rust; judgment was subsequently entered on the verdict in favor of the surviving defendant, and the plaintiffs in error brought the case on error to the United States Circuit Court of Appeals for the Sixth Circuit, where the judgment of the circuit court was affirmed, and now bring the case to this court on error.

The plaintiff in error claims title under the "swamp land grant," so called, being an act of Congress approved September 28, 1850, and entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits."

9 Statutes at Large, p. 519.

Under the provisions of this act the Secretary of the Interior, acting through the Commissioner of the General Land Office, submitted to the State of Michigan for its choice, two methods by which the lands inuring to the State should be determined.

Whether the State would adopt the field notes of the surveys, filed in the Surveyor-General's office as the basis of the list of lands granted to the State, or whether the State would conclude to have surveys made for the purpose of determining the boundaries of the swamp and overflowed lands. This option to the State was in pursuance of a plan adopted by the General Land Office to charge the Surveyor-General wherever the office still existed, with the making out of the lists in the first place, and where the office had been abolished to devolve that duty on the land offices of the respective districts. Considerable correspondence was had between the General Land Office, the Surveyor-General and the State authorities as to which method should be adopted.

Report C. G. L. O. for 1850, Exhibits 2, 3, 3A, 4 6,
Record, pp. 16 21.

The Governor of Michigan submitted the matter of selection to the Legislature of Michigan of 1851 (Exhibit 7, p. 21), and the Legislature by an act entitled "An Act to provide for the sale and reclaiming of the Swamp Lands granted to the State, and in the disposition of the proceeds," approved June 28, 1851, elected to "adopt the notes of the surveys on file in the Surveyor-General's office as the basis upon which they are to receive the swamp land granted to the State by the act of Congress of September 28, 1850."

See Appendix No. 1.

This arrangement has been recognized by the Secretary of the Interior in his adjudications from that time to the present, both under the original grant and the subsequent acts of Congress of March 2d, 1855, March 3d, 1857, and March 12th, 1860.

Noble, S. G., to Butterfield, C. G. L. O., June 18, 1851, Exhibit 10, p. 23.

Wilson, C. G. L. O., to Goodrich, April 25, 1855, Exhibit 19, p. 28.

Hendricks, C. G. L. O., to Goodrich, December 13, 1855, Exhibit 20, p. 28.

Hendricks, C. G. L. O., to Governor Bingham, December 13, 1855, Exhibit 21, p. 29.

Wilson, C. G. L. O., to Governor of Michigan, May 21, 1860, Exhibit 22, p. 30.

Hendricks, C. G. L. O., to Treadwell, C. S. L. O., December 22, 1858, Exhibit 23, p. 31.

Drummond, C. G. L. O., to Edmonds, C. S. L. O., December 27, 1871, Exhibit 24, p. 34.

Williamson, C. G. L. O., to R. & R., Detroit, September 6, 1877, Exhibit 25, p. 34.

Following this election by the Legislature, and in pursuance of the instructions of the Commissioner of the General Land Office, of November 21, 1850, (Exhibit 3A, p. 17), and

of December 12, 1850, (Exhibit 9, p. 22), the Surveyor-General prepared lists of lands inuring to the State, and among other lists that known as Grand River No. 1, which contained the lands in controversy in this suit, and bears date March 29, 1852. This list was transmitted by the Surveyor-General to the Commissioner of the General Land Office, under date of March 31, 1852, (Exhibit 11, p. 24), and was received at the General Land Office April 13, 1852, (Exhibit 12, p. 25.

Subsequent to the filing of this list with the Commissioner of the General Land Office, the Secretary of the Interior in compliance with the second section of the act of September 28, 1850 approved to the State the land in controversy in this suit in Approved List Ionia No. 1, under date of October 27, 1853, (Exhibit 27, p. 37), and January 13, 1854, transmitted to the Governor of Michigan a certified copy of the said list (Exhibit 15, p. 26), and March 13, 1854, (Exhibit 16, p. 26), transmitted to the Governor of Michigan the plat showing the lands approved to the State under the act of September 28, 1850, in the district of lands subject to sale at Ionia, a portion of which map containing the lands in controversy in this case is found opposite page 47 of the Record.

The Governor of Michigan acknowledged receipt of the certified lists January 31, 1854, and at the same time requested the issue of patents thereon to the State of Michigan (Exhibit 112, p. 157, Exhibit 27, p. 37). No patent has ever been issued to the State of Michigan for the lands in controversy in this suit.

The field notes referred to in the act of the State Legislature (Appendix No. 1), and the plats referred to by the Surveyor-General in his letter to the Commissioner of the General Land Office, June 18, 1851 (Exhibit 10, p. 23), and in the correspondence as to the use of the field notes and plats as a basis of the selection above cited, were the original documents, and were transferred to the State of Michigan,

under act of Congress, June 12, 1840 (5 Statutes at Large, 384), and March 3, 1845 (5 Statutes at Large, 758), May 15, 1858, and February 6, 1860.

Record, p. 27, Exhibit 17, p. 27.

The field notes covering the lands in controversy in this suit are set out in full as Exhibit 30, commencing at page 40, and the plat from which the lists above referred to were made up is found as Exhibit 31, opposite page 46. From these it appears that the lands in controversy are correctly designated as lands inuring to the State of Michigan under the swamp land grant in pursuance of the instructions of the Commissioner of the General Land Office of November 21, 1850 (Exhibit 3A, p 17).

The plaintiff also showed by the records from the United States Land Office that the lands were vacant and unappropriated and not interfered with by actual settlements under the laws of the United States on the 3d day of March, 1857.

Testimony of Oscar Palmer, Record, p. 48.

The lands were conveyed by the State of Michigan to Edward W. Sparrow, in payment for certain work of improvement required by Act 130 of the Session Laws of 1883 of the State of Michigan, by two patents bearing date April 14, 1887 (Exhibit 33, p. 53, and Exhibit 34, p. 54), and were subsequently conveyed by Mr. Sparrow to the plaintiff in error by a deed dated October 31, 1887 (Exhibit 35, p. 55.)

Plaintiff also showed by its witness George W. Doxie that the lands in controversy were worth two thousand dollars ($2,000) and upwards (p. 57 of the Record).

DEFENDANT'S TITLE.

The defendant claims title through several patents of the United States to William A. Rust, dated May 10, 1870, purporting to be issued in pursuance of purchases made by Mr. Rust at the Ionia Land Office in Michigan (Exhibit 38, p. 60;

Exhibit 39, p. 60; Exhibit 40, p. 61), and under a patent of the United States to Addison P. Brewer, dated January 10, 1867, purporting to be issued in pursuance of a purchase made by Mr. Brewer at the Ionia Land Office (Exhibit 51, p. 63). Several *mesne* conveyances—given in exhibits—by which title was traced from Mr. Rust and Mr. Brewer to the defendants to an undivided one-half of the land in controversy. These are referred to on page 64 of the Record.

Defendants in support of their title offered a large mass of correspondence between the General Land Office and the Surveyor-General, and the Michigan officials and others; commencing as early as 1842, and carried on until sometime after 1880, which is summarized below.

February 1, 1842, the Legislature of Michigan, by joint resolution (Exhibit 57, p. 64) requested the President of the United States to cause a survey to be made of certain townships which were represented to have been imperfectly surveyed. The particular townships involved were mentioned, there being eighty-one whole and fractional townships, lying for the most part east of the principal meridian, and north of Town 18 north, and did not include the township in controversy in this case.

A copy was forwarded to the President of the United States, February 3, 1842, and by him referred to the Commissioner of the General Land Office, who in turn referred the matter to Surveyor-General Haines, who reported March 4, 1842, that he personally was not aware of any such imperfections as had been referred to in the resolution, but explained how the matter might have occurred, and suggested that the districts be examined by some reputable deputy surveyor (Exhibit 60, p. 68). William A. Burt, a deputy surveyor, was instructed, April 11, 1842, to examine certain of the towns for the purpose of ascertaining the character of the imperfections alleged (Exhibit 62, p. 75). In August of that year Burt seems to have made a report, and resurveys of the

towns alleged to be imperfectly surveyed were ordered. Resurveys continued on these towns until 1848 or 1849. In a report made in 1849 by Burt it is set forth that there were some imperfections in the survey of the town involved in this controversy. This report is part of Exhibit 74, p. 89. Correspondence was had during this period between the General Land Office and Surveyor-General and others inquiring as to the progress of the work of resurvey, the greater part of which is referred to and summarized in a report of Moses Kelley of February 14, 1851, entitled "Resurveys in the State of Michigan" (Exhibit 75, p. 96).

To the introduction of all this proof relating to the resurveys, prior to 1850, objection was made on the part of the plaintiff, that the matter was immaterial and irrelevant.

Subsequent to 1850, and from that time until the latter part of 1857, resurveys were still carried on. The Surveyors-Generals recommendations are set forth in the reports of the Commissioners of the General Land Office and Surveyors-General for the years 1850 to 1858 inclusive (Exhibit 76, p. 100; Exhibit 78, p. 105; Exhibit 81, p. 113). The progress of this work is set out in various letters which passed between the Surveyor-General and the General Land Office during this period. To the introduction of this testimony objection was made by the plaintiff that it was immaterial and irrelevant to the issue.

New field notes of these resurveys were prepared in the usual form, and from the field notes new plats delineating the surveys were also prepared. These field notes and plats of the new surveys were turned over to the authorities of the State of Michigan, and are mentioned in the inventories above referred to. The field notes for Town 18 North and 3 West, which contain the lands in controversy in this suit, are sworn to December 26, 1856, and are set out as Exhibit 114, p. 150. The plat is certified under date of February 12, 1857, and is found opposite p. 174, being Exhibit 123 of the record.

Mr. Palmer's testimony shows that the Register's plat was received at the United States Land Office June 3, 1858, and is dated May 12, 1858, (Record, p. 50), and a copy of the plat was sent to the Commissioner February 12, 1857 (Record, p. 124-125.)

Under date of October 4, 1852 (Exhibit 91, p. 133), the Surveyors-General was instructed to prepare new swamp land lists, "in explanation of the former ones," and "to designate them as having been made out in lieu of the former ones."

Lists were prepared from time to time subsequent to this date and forwarded to the Land Office (Exhibit 93, p. 134; Exhibit 95, p. 135), and the list covering Town 18 North Range 3 West, is known as Grand River Supplemental List No. 3, certified to by the Surveyor-General May 13, 1858, and was enclosed to the Commissioner of the General Land Office under date of May 12, 1858 (Exhibit 124, p. 175; Exhibit 125 p. 177). Subsequently the greater portion of the lands contained in Grand River Supplemental No. 3, were approved by the Secretary of the Interior, and certified in lists known as Ionia No. 10, under date of May 18, 1866 (Exhibit 127, p. 178), and Ionia No. 20, certified September 13, 1875 (Exhibit 140, p. 198). Copies of these approved lists were in due time sent to the Governor of the State of Michigan, and patents were issued for the lands contained in these two approved lists June 21, 1866, and July 31, 1876.

To the introduction of this documentary proof, and the correspondence connected with it, the plaintiff objected that it was immaterial and irrelevant.

Defendants, in further support of their title, introduced in evidence a number of letters from the Commissioner of the General Land Office to the Governor of Michigan, requesting certain erasures, interlineations and additions, and other changes, to be made in various approved lists of swamp lands which had been theretofore forwarded to the Governor by the General Land Office, and the answer of the Governor to

their requests stating that the modifications requested had been made upon the copies which had been forwarded to the State. And further introduced in evidence the lists showing such erasures and other modifications with notations referring to the correspondence under which this had been done. The first of these letters seems to have been January 20, 1854, and such requests were forwarded from time to time from that date to July 1, 1854. (These exhibits are from 98 to 109 inclusive, pages 136 to 148 inclusive, and Exhibit 119, p. 171). To the introduction of these matters plaintiff objected on the ground that they were immaterial and irrelevant to the issue.

Defendants, in further support of their title, sought to show that wherever resurveys had been made, the lists founded upon the old surveys were set aside, and thereafter the General Land Office recognized only the lists founded upon the surveys, and introduced considerable correspondence between the General Land Office and the Surveyors-General and the Registers and Receivers of the United States Land Office, and between the General Land Office and the State Land Office. The exhibits referring to this phase of the controversy are scattered through the Record, and we shall not undertake to collect them here.

To the introduction of these exhibits the plaintiff objected that they were immaterial and irrelevant to the issue.

Defendants also urged that in 1861 the Legislature of Michigan passed an act authorizing the Commissioner of the General Land Office to select any existing deficiency that there might be due the State from the United States, under the act of Congress of May 20, 1826, and any subsequent act of Congress whereby lands were granted to the State of Michigan.

> Act 123, Session Laws of Michigan, 1861, p. 167.
> See Appendix No. 2.

The several Commissioners of the State Land Office, from

time to time, made requests of the General Land Office for the approval and certification of the lands listed by the Surveyors-General, and a considerable quantity of lands was obtained by certification and approval to the State, and subsequently patents issued thereon. The various commissioners reported, from time to time, their proceedings looking to the adjustment of the swamp land grant and other grants made to the State of Michigan by Congress, in their official and published reports. These reports and considerable of the correspondence between the State Land Office and the General Land Office were introduced in evidence on the part of the defendant, against plaintiff's objection.

Defendants to further sustain their title, introduced in evidence a tax deed from the State of Michigan to defendant Charles A. Rust, dated July 30, 1892, for the delinquent taxes of the year 1888, the deed covering the land in controversy in this suit. To the introduction of this deed objection was made on the part of the plaintiff, that it was irrelevant to the issue and incompetent, and not admissible under the plea of the defendants.

### Plaintiff's Rebuttal.

The plaintiff read from the several reports of the Commissioner of the General Land Office from 1855 to 1891, including a series of schedules giving the amount of the land selected by the State of Michigan as swamp land, the amount approved to the State, and the amount patented, contending that it appeared that lands had been approved and patented to the State in nearly every year of that period, with some slight increase of selection after 1880, and that similar statements were made in the other reports of the Commissioner of the General Land Office (Exhibit 165, p. 244, and 166, p. 245), and that the reports of the Commissioner of the State Land Office were to the same effect (Exhibit 167, p. 246).

Plaintiff also introduced a series of letters between the

Commissioner of the General Land Office and the several Surveyors-General in 1856 and 1857, which it was claimed exhibited some reasons for the closing of the resurveys for Michigan, although all the work contemplated by the reports of the Surveyor-General had not been completed (Exhibits 169 to 175 inclusive, pp. 251 to 258 inclusive).

Plaintiff also offered in evidence the records and files in the cases of the *United States vs. Henry Nicholson et al.* and the *United States vs. Henry Brevoort et al.*, suits brought in the Eastern District of Michigan by the United States on the bonds given by the defendants as deputy surveyors, and whose surveys were reported defective by Mr. Burt, as set forth in the report of the Surveyor-General for the year 1849 (Table N, p. 94.) The suits were tried before a jury, resulting in a verdict for the defendants, and in this connection such reports of the details of these cases as are set forth in the letter of J. M. Howard to the Secretary of the Interior, December 13, 1850 (Exhibit 176, p. 270.) and two letters of the United States District Attorney of February 10, 1851 and February 11, 1851, the latter addressed to the Commissioner of the General Land Office (Exhibit 177–178, p. 272) were offered. These letters stated in substance that the proof was conclusive that the surveys had actually been carried out in complete compliance with the instructions of the Surveyor-General, and that it was the opinion of Mr. Bates that in the event of a new trial the verdict would eventually be for the defendants.

To the introduction of these letters objection was had by the defendants that they were irrelevant and immaterial, and the objection was sustained.

Plaintiff also offered certain letters, in addition to those admitted in evidence, between the Commissioner of the General Land Office and the Surveyor-General, including letters of a former deputy, which it was contended, tended to show that the resurvey as being prosecuted was largely fraudulent;

to the introduction of which defendants objected that they were immaterial and irrelevant, which objection was sustained (Exhibit 179, p 274.) Plaintiff also introduced letters between the Commissioner of the General Land Office and the Surveyor-General, and a report of the chief clerk of the latter, tending to show, it is claimed, that the real purpose of the resurvey was to reduce the amount of the swamp lands which the state would receive under the old survey, to which a similar objection was interposed on the part of the defendant, and was sustained (Exhibits 180, 181 and 182, pp. 276 to 278, inclusive.)

The plaintiff submitted to the court several requests to charge, outlining in great part its theory of the case, a greater portion of which the District Judge refused to give: an exception was duly taken. On inquiry from the court, the defendants made no claim under the statute of limitations, and then requested the court to direct a verdict for the defendants, to which an exception was taken by the plaintiff; and the court, after delivering its opinion, so directed the jury.

To all of which exception was duly had.

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## Errors Relied On.

The errors alleged in the Record, and relied upon by the plaintiff in error, are as follows:

1. In holding that no error was committed by the trial court in not permitting the plaintiff to show by its witness, Oscar Palmer, that prior to 1853, and between 1850 and 1853, that the general government, through its land department, had sold lands in every section by the plats of the old survey, in town 18 north, 3 west, State of Michigan, and had thus recognized this old survey (Record, p. 52).

2. In holding that no error was committed by the trial court

in not permitting witness Oscar Palmer to testify in answer to the question, "I will ask you if it was not a fact, that in this same town and some of these sections, land was sold; take 20, 21, 22, 28 and 35, and see if they were not sold on the same section before the resurvey?" (Record, p. 52.)

3. In holding that there was no error committed by the trial court in not permitting plaintiff to show by its witness, Oscar Palmer, that the plat of the old survey of said township, 18 north, 3 west, "was a recognized government survey, and in actual use by the government, up to and including March 3, 1857," (Record, p. 52).

4. In holding that no error was committed by the trial court in admitting in evidence, against the objection of plaintiff, Exhibit 57, being a letter from John S. Barry to the President of the United States, dated February 3, 1842, sending inclosed therewith a copy of joint resolution of the Legislature of Michigan, approved February 1, 1842, asking for the resurvey of eighty-one whole and fractional townships in said State, all lying east of the principal meridian, except towns 16, 17 and 18 north of ranges 6, 7 and 8 west, which exhibit is set out in full on pages 64 and 65 of the Record.

5. In holding that no error was committed by the trial court in admitting in evidence, against the objection of plaintiff, Exhibit 58, being a letter of E. M. Huntington, Commissioner of the General Land Office, to President Tyler, dated February 17, 1842, returning to the President the letter and inclosure of February 3, 1842 (Exhibit 57), and inclosing a diagram showing the districts referred to in the resolution, and stating that the records of the land office showed no evidence of irregularities in the surveys; that all the land except one township was open to private entry, and recommending that the matter be referred to the Surveyor-General at Cincinnati for examination; on which letter is an indorsement of the President directing such reference, all of which is set out in full on pages 65 to 66 of the Record.

6. In holding that the error was committed by the trial court in admitting in evidence, against the objection of plaintiff, Exhibit 59, being a letter of E. M. Huntington, Commissioner of the General Land Office, to John S. Barry, Governor of Michigan, dated February 21, 1842, acknowledging receipt of the Governor's letter of February 3, 1842, with its inclosure (Exhibit 57), and inclosing a copy of the Commissioner's instructions to the Surveyor-General at Cincinnati, dated February 21, 1842, which instructions were to report any facts in his possession bearing on the matter, and make any suggestions that might occur to him for the correction of the supposed errors and preventing them in the future. A similar diagram to that laid before the President was inclosed, also a letter to Dr. Houghton, of October 22, 1840, from J. A. Rosseau, acknowledging some defects in surveys made by him; also directing the Surveyor-General to enforce certain standing instructions to deputy surveyors, all of which is set out in full on pages 67 to 68 of the Record.

7. In holding that there was no error committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 60, being the report of Surveyor-General Haines to E. M. Huntington, Commissioner of the General Land Office, dated March 4, 1842, in pursuance of the instructions of February 21, 1842. The report says deputies were appointed on the recommendation of parties known to the office upon which he must rely for evidence of the integrity of the deputy. As to the Rosseaus he found them employed when he took the office, and the employment was continued. Their work had been in the main satisfactory, and when errors had been found they had been corrected. In the summer of 1840, he had been informed that affidavits had been lodged with the Register of the land office at Genessee, Mich., charging irregularities in the surveys. He then details how the letter to Dr. Houghton came to be written. He had written the Register a number of times, but had received no reply,

and doubts the existence of any affidavits. Had made inquiry at other sources as to the Rosseau surveys, but failed to obtain any accurate information. As to the districts of other deputies the letter of instructions contained the first information of irregularities.

The Surveyor-General recommends that Wm. A. Burt and John H. Mullatt be employed to examine the towns charged to be erroneous, and report their condition, and if found defective, that new surveys be made at the expense of the contractors or their bondsmen.

He then explains how it might be possible for a deputy to make up fictitious returns of surveys, and says that such impositions had been practiced under some of his predecessors, and suggests that no Michigan official had ever complained to him of the state of the surveys, and that he was yet ignorant of the character of the alleged frauds.

He then makes some suggestions as to providing against future errors.

All of which is set out in full on pages 68 to 74 of the Record.

8. In holding that there was no error committed by the trial court in admitting in evidence over the plaintiff's objection, Exhibit 61, being a letter of E. M. Huntington, Commissioner of the General Land Office, to Governor Barry of Michigan, dated April 21, 1842, inclosing a copy of his instructions of the same date to Surveyor-General Haines issued in consequence of the report of the latter, directing the employment of an experienced deputy to examine the towns alleged to be fraudulently surveyed, and containing some general instructions for such deputy. All of which is set out in full on pages 74 to 75 of the Record.

9. In holding that there was no error committed by the trial court in admitting over the objection of plaintiff, Exhibit 62, being the instructions of Surveyor-General Haines to Wm. A. Burt, dated April 11, 1842, Mr. Burt being em-

ployed to make the examination. The letter recites the previous correspondence with the Commissioner of the General Land Office, and instructs Mr. Burt to examine and report upon certain towns, sending him the original field notes of some of them, all of which is set out in full on pages 75 to 77 of the Record.

10. In holding that no error was committed by the trial court in admitting over plaintiff's objection Exhibit 43, being a letter dated August 1, 1842, of Surveyor-General Johnson to Thomas H. Blake, Commissioner of the General Land Office, which transmits to the Department Mr. Burt's report on towns examined, and makes some comments on the same, found in full on page 77 of the Record.

11. In holding that no error was committed by the trial court in admitting over plaintiff's objection, Exhibit 64, being a letter dated October 4, 1842, of Blake, Commissioner of the General Land Office, to Hon. A. S. Porter, which acknowledges the receipt of a prior letter, and advises him of the receipt of the report of Mr. Burt, and that the towns examined appeared to be defective and fraudulent, and that it was the design of the office to issue the instructions for the necessary resurveys, which letter is found in full on page 78 of the Record.

12. In holding that no error was committed by the trial court in admitting over plaintiff's objection, Exhibit 65, being a letter dated April 27, 1843, from Wm. Johnson, Surveyor-General, to Thomas H. Blake, Commissioner, acknowledging receipt of advices that $4,000 had been set apart for making the resurveys, and stating the sum was not sufficient, and that in consequence the surveys would be confined to the towns nearest the coast, and that three deputies had been instructed to be ready to take the work, which letter is found on pages 78 and 79 of the Record.

13. In holding that no error was committed by the trial court in admitting over plaintiff's objection, Exhibit 67, being

a letter dated September 16, 1844, from Wm. Woodbridge to Blake, Commissioner of the General Land Office, urging the appropriations for surveys in Michigan, and particularly the prosecution of the work of resurveying the towns alleged to have been fraudulently surveyed, and alleging that the Genesee land office was selling lands by the plats of the old survey after new one made, which letter is found in full on pages 80 to 82 of the Record.

14. In holding that no error was commited by the trial court in admitting over the objection of plaintiff, Exhibit 68, being a letter of Commissioner Blake to Hon. Wm. Woodbridge, dated September 30, 1844, acknowledging receipt of his letter of the 16th, stating that $15,000 had been apportioned to the surveys for the district of Ohio, Indiana and Michigan, and that under instructions to the Surveyor General practically the entire sum would be expended in Michigan; that instructions had been issued for certain resurveys; that the land officers at Genesee had been written to regarding the alleged sales by the plats of the old survey, which letter is found in full on pages 82 and 83 of the Record.

15. In holding that no error was committed by the trial court in admitting in evidence over the objection of the plaintiff, Exhibit 69, being a letter of Blake, Commissioner of the General Land Office, to the Register and Receiver of the Land Office at Genesee, Michigan, dated October 1, 1844, stating he is advised that the plats of the old survey are being used in making sales, and desires to know the reason, and that these plats should have been canceled on receipt of the plats of the new survey, and proper reference made, and that the plats of the fraudulent survey should not be used, which letter is found in full on page 83 of the Record.

16. In holding that no error was committed by tne trial court in admitting over the objection of plaintiff, Exhibit 71, being a letter of Richard M. Young, Commissioner of the

General Land Office, to Hon. A. Felch, dated February 17, 1849, stating that he had written Hon. S. Breese, chairman of committee of public lands, requesting the appropriation of $10.000 for the correction of erroneous and defective surveys in southern Michigan, which letter is found in full on page 87 of the Record.

17. In holding that no error was committed by the trial court in admitting over objection of the plaintiff, Exhibit 72, being a letter dated February 17, 1849, from Richard M. Young, Commissioner, to Hon. S. Breese, requesting the insertion of $10.000 in the appropriations for the correction of surveys in Michigan, which letter is found in full on page 87 of the Record.

18. In holding that no error was committed by the trial court in admitting in evidence over the objection of plaintiff, Exhibit 73, being a letter dated July 10, 1849, from Lucius Lyon, Surveyor-General, to Justin Butterfield, Commissioner, which acknowledges letter of the 4th ult. from Mr. Butterfield's predecessor, advising of appropriations for surveys in Michigan, and containing certain instructions as to resurveys. Commenting on these instructions thinks it better and less expensive to make entire new surveys rather than attempt joining old lines to new ones. That Mr. Burt and Mr. Risdon were then in the field making examination of surveys, their compensation to be such as the Commissioner sees fit to allow. These examinations the Surveyor-General considers necessary in order to ascertain what frauds have been committed in the surveys, also as useful in determining how the appropriation of $10.000 would be expended. Reports have been received from Mr. Burt up to the 3d of the last month, but none from Mr. Risdon; which letter is found in full on pages 88 and 89 of the Record.

19. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 75, being a statement entitled "Resurveys in the State

of Michigan," signed by Moses Kelly, clerk, dated "General Land Office, Feby. 14, 1851," being a general resume of the correspondence between the land office and the Surveyors-General and the State of Michigan, and the action of Congress in making appropriations from time to time, the principal particulars of which are contained in Exhibits 57 to 74 inclusive, which report is found on pages 96 to 100 of the Record.

20. In holding that no error was committed by the trial court in admitting in evidence over the objection of the plaintiff, Exhibit 79, being a letter dated February 10, 1852, from Surveyor-General Noble to Commissioner Butterfield, inclosing a report of Deputy Surveyor A. S. Wadsworth. The letter acknowledges receipt of a letter from the Commissioner of November 25, and incloses a diagram representing the townships already resurveyed, districts reported fraudulent, and states that the balance of the prosecution of the resurveys, should they be ordered without reference to the suits pending in the United States Court, would be substantially as proposed in the letter of the 5th of March, 1851. He considers the district west of Saginaw Bay of the first importance for resurvey, and continuing with districts near Grand Traverse Bay, until all are completed. Commenting on certain rules sent in a letter from the Commissioner under date of June 25, last, he considers them of a restrictive character, and that it does not appear that the present practice of the office was in conflict of the principles therein contained, but thinks no instructions can meet the exigencies of every case, but much must be left to the judgment of the deputy. The employment of co-deputies he considers involved with practical difficulties and productive of little good. In the mineral regions, where the solar compass is used, the most of the work must be done in fair weather, and that possibly there an assistant to run random lines might be useful. In disconnecting the examinations from the work of resurveys, the expense to the government had been increased. In fixing the price for resurvey

where the districts are near the coast, the maximum price of $6 has not been allowed, but has been where the districts were in the interior. He recommends that, if a further examination of resurveys are deemed necessary, that they should be disconnected from resurveys or new surveys, and that in townships where sales had been made or lands are occupied, that the portions sold or occupied should be treated as private claims, and the new surveys run up to the boundaries of the parcels so occupied. Letter contains other remarks and comments upon the instructions, explaining why it is necessary to deviate from them from time to time the whole matter being submitted to the judgment of the department. The report of Mr. Wadsworth bears date December 24, 1851, and purports to give a general view of the character of the country running from Saginaw to Grand Traverse, and from Grand River to Grand Traverse and towards the Straits of Mackinaw, purporting to describe character of the timber, of the soil, and the amount of land which appears to be swampy and the amount which appears to be valuable for farming purposes. Some remarks are also made on the character of the climate at different points within this territory, which letter and inclosure are found on pages 107 to 112 of the Record.

21. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 80, being a letter from Butterfield, Commissioner, to Noble, Surveyor-General, dated March 8, 1852, acknowledging a communication of the 10 ult. by the hands of Mr. Frost, the chief clerk, on the subject of the resurveys in this State, and divides the matter of the resurvey of the State into two classes, first, incomplete surveys, where a portion only of the lines of a township are found to be surveyed, but where some lines have been run and corners established such portions as can be made available by retaining all remaining undisturbed. The second class are fraudulent surveys, where there is no

evidence found of the good intent on the part of the deputy to comply with his contract, and an entire absence of the marks and monuments to designate corners, and no lines traceable. In this class of cases the lines and corners found are to be obliterated, except where parcels are occupied and the occupant insists on having the monuments preserved, in which case his requests shall be respected. Otherwise they are to establish new lines and new monuments, the work to be inspected before payment, to the satisfaction of the Surveyor-General, these inspections to be paid for at the per diem allowance, which exhibit is found on pages 112 to 113 of the Record.

22. In holding that no error was committed by the trial court in admitting in evidence over the objection of the plaintiff, Exhibit 82, being a letter dated June 11, 1847, from Lucius Lyon, Surveyor-General, to Richard N. Young, Commissioner, stating that in compliance with a request for a computation of the number of acres of swamp land in each district, but a mere approximation to accuracy can be given, as the old surveys show the swamp only at the intersection with the lines of survey. Not having the Ohio surveys in his possession, he will confine his estimates to Indiana and Michigan. The letter is set out in full on page 126 of the Record.

23. In holding that no error was committed by the trial court in admitting in evidence over the plaintiff's objection, Exhibit 83, being a letter dated June 7, 1853, from John Wilson, Commissioner, to the Surveyor-General at Detroit, stating that in adjusting the swamp selections in the Grand River district a difficulty had arisen over the supplemental list dated December 8, 1852. The Surveyor-General, under date October 4 last, had been instructed to make out these lists in lieu of the former ones. Which in the heading of the list was evidently lost sight of. In certain towns the selections are the same, while in others the supplemental list contains fewer selections. The Commissioner inquires which is to govern,

the original or the supplemental list? Whether the supplemental list is to be considered corrective or to be taken in lieu of the original. The letter is to be found in full on pages 126 and 127 of the Record.

24. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 84, being a letter dated July 29, 1853, from John Wilson, Commissioner, to the Register at Detroit, transmitting certified copy of Approved List No. 1 in his district, and containing instructions as to how the entries concerning should be made in the tract book and in the plats of his office, and to advise the Commissioner of any errors, etc., he may find, which letter is found on pages 127 and 128 of the Record.

25. In holding that no error was committed by the trial court in admitting in evidence over the plaintiff's objection, Exhibit 85, being a letter dated July 30, 1853, from John Wilson, Commissioner, to the Register at Detroit, transmitting list A, No. 1, of his district, showing selections of swamp land rejected as being disposed of prior to the grant, and instructing him as to the manner of making the entries in connection of the entries made from the Surveyor-General's list, on the books of the office, which letter is found on page 128 of the Record.

26. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 86, being a letter dated September 5, 1863, from J. M. Edmunds, Commissioner, to the Register at Ionia, Michigan, stating that certain descriptions were confirmed selections, and would be approved to the State; that certain others though selected would not be approved, as they did not appear in the list subsequently made by the Surveyor-General to supersede the previous list, but they must be restored to the market in the usual way before they will be subject to private entry, which letter is found on pages 128 and 129 of the Record.

27. In holding that no error was committed by the trial

court in admitting in evidence over plaintiff's objection, Exhibit 87, being a letter dated September 19, 1854, from John Wilson, Commissioner, to Chapman, Surveyor-General, Detroit, inclosing an affidavit of O. M. Barnes, relating to the character of certain lands in the Ionia district, and that Mr. Barnes had been advised that if the swampy character of the land was doubtful, he would be permitted to contest the claim of the State, and that from an examination of the plats and field notes the Commissioner thinks there is doubt, which letter is found on page 129 of the Record.

28. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 88, being the reply of Surveyor-General Chapman dated September 27, 1854, to the preceding letter, stating that in determining the swamp lands inuring to the State the instructions of November 21, 1850, had been followed, the State having accepted the field notes and plats as the basis of selections. That this course was followed in making up the lists. In the case in question there are three ways of drawing the lines, which he illustrates by a diagram annexed to the letters. The selections are based on a survey made in 1826, and the land may then have been of the character granted. Some defects in the affidavit of Mr. Barnes are pointed out, and on the whole is of the opinion that the swamp selection is correct, which letter is found on pages 129 and 131 of the Record.

29. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 89, being a letter dated October 6, 1854, from John Wilson, Commissioner, to Chapman, Surveyor-General, acknowledging the receipt of the letter (the preceding assignment) stating none of the three ways of connecting the swamps as indicated in the diagram appear to be proper. In this case he has decided to give Mr. Barnes an opportunity of furnishing evidence as to the character of the land in question, and indi-

cates the character of the testimony to be furnished, which letter is found on pages 131 and 132 of the Record.

30. In holding that the trial court committed no error in admitting in evidence over plaintiff's objection, Exhibit 90, being a letter dated September 18, 1852, from Surveyor-General Noble to Commissioner Butterfield, calling attention to the purchase of a tract by Mr. Bartlett of the Register at Kalamazoo, prior to the receipt of the swamp lists. That nothing had been heard from the Register at Detroit, Flint and Sault Ste. Marie, in reference to the lists in their hands for annotation.

A supplemental list embracing all new surveys will be furnished the Commissioners at an early day, and inquires in regard to towns resurveyed, which will govern, the old or new surveys, which letter is found on page 132 of the Record.

31. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 91, being a letter dated October 4, 1852, from John Wilson, Commissioner, to Noble, Surveyor-General, requesting him to re-examine his notes and plats as to the tract desired by Mr. Bartlett, and if swamp, advise him that the same is not subject to entry and if not, to report to the Commissioner's office, and to do the same as to the parcels sold by the Register at Kalamazoo. That in making out supplemental lists he should make three copies, one for himself, the Register and for the Commissioner; that in towns resurveyed he should make new lists of selections, designating the lists as being in lieu of the former ones, which letter is found at page 133 of the Record.

32. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 92, being a letter dated June 24, 1853, from Surveyor-General Chapman to Wilson, Commissioner, acknowledging receipt of a letter of June 7; that in making up the supplemental list it should have been stated at the head of the list or

in the letter of transmissal, that it was in lieu of the former list, that such lists were made up without reference to the old lists or plats. The question as to which list should govern he supposed would be decided by the Commissioner, but thinks the supplemental list should govern, and that hereafter it will be so considered, which letter is found on pages 133 and 134 of the Record.

33. In holding that no error was committed by the trial court in admitting in evidence over objection of plaintiff, Exhibit 93, being a letter dated October 29, 1853, Surveyor-General Chapman to Commissioner Wilson, transmitting Supplemental List No. 2, Grand River District, which letter is found on page 194 of the Record.

34. In holding that no error was committed by the trial court in admitting over plaintiff's objection, Exhibit 94, being a letter dated November 7, 1853, Commissioner Wilson to Surveyor-General Chapman, acknowledging receipt of the list contained in the foregoing letter, and that the original list will be altered to conform to it, which letter is found on page 134 of the Record.

35. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 95, being a letter dated January 31, 1855, Surveyor-General Chapman to Commissioner Wilson, transmitting list of swamp lands in Cheboygan land district, surveyed and platted up to January 15, 1855. With this list he believes descriptions of swamp lands in every township in the State had been transmitted to the Commissioner, and asks if it will be proper to furnish new lists as heretofore of lands hereafter resurveyed, which letter is found on page 135 of the Record.

36. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 96, being a letter dated February 12, 1855, Wilson, Commissioner, to Chapman, Surveyor-General, acknowledging receipt of the lists contained in the last letter, and advising him

that it will be necessary to continue to furnish the lists as heretofore, which letter is found on page 135 of the Record.

37. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 97, being the published report of the Commissioner of the Michigan State Land Office for the year ending September 30, 1852, which states that no lists had yet been received of the swamp lands; gives a letter from the General Land Office, dated November 2, 1852, on the subject, which referring to an application to have certains lands approved in advance of the regular lists, which lands were in three different land districts, states that a rule has been established not to take action on isolated tracts without taking action on the entire list in that district, as it would retard the final adjustment, but the matter of selection would be acted upon at the earliest period; all of which is set out in full on page 136 of the Record.

38. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 98, being a letter dated January 20, 1854, Commissioner Wilson to Governor Parsons of Michigan, requesting that he cause to be erased from Approved List No. 1, Kalamazoo district of swamp lands, a certain tract erroneously approved, the lands being sold in 1836, to enter in place of it the tract intended to be approved, and to advise the General Land Office of the corrections, which letter is found on page 136 of the Record.

39. In holding that no error was committed by the trial court in admitting in evidence, over plaintiff's objection, Exhibit 99, being a letter dated January 30, 1854, Governor Parsons to John Wilson, Commissioner, acknowledging the preceding letter and advising that the corrections had been made, which letter is found on page 137 of the Record.

40. In holding that no error was committed by the trial court in admitting in evidence, over plaintiff's objection, Ex-

hibit 100, being a letter dated February 24, 1854, Commissioner Wilson to Governor Parsons, requesting him to cause the copy of Approved List No. 4, Genesee district, swamp lands, to be corrected by erasing certain descriptions, and in place thereof inserting certain others, and advise the General Land Office if done, which letter is found on pages 137 and 138 of the Record.

41. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 101, being a copy of Ionia Approved List No. 4, from the State Land Office, showing erasures in the list with reference to the Commissioner's letter of February 24, 1854 (Exhibit 100, p. 137), which list is found on pages 138 and 139 of the Record.

42. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 102, being a letter dated March 31, 1854, from Commissioner Wilson to Governor Parsons, requesting him to cause certain corrections to be made in the copy of Genesee Approved List No. 1, by erasures and insertion of descriptions, and as to certain others, inasmuch as they had been disposed of by the general government subsequent to September 28, 1850, to mark them "suspended," and to advise the General Land Office of the corrections, which letter is found on pages 139 and 140 of the Record.

43. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 103, being Genesee Approved List No. 1, from the State Land Office, showing the corrections and annotations requested in the Commissioner's letter, March 31, 1854, with reference to the same, which list is found on pages 140 to 142 of the Record.

44. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 104, being a letter dated April 25, 1854, from Commis-

sioner Wilson to Governor Parsons, requesting him to cause the copy of Genesee Approved List No. 2 to be corrected by erasing certain descriptions, adding others and changing other items, and to advise the General Land Office of the corrections, which letter is found on pages 142 and 143 of the Record.

45. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 105, being Genesee Approved List No. 2, from the State Land Office, showing the erasures, corrections and additions requested in the Commissioner's letter of April 25, 1854 (Exhibit 104), which list is found on pages 143 to 145 of the Record.

46. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 106, being a letter dated May 29, 1854, from Commissioner Wilson to Governor Parsons, requesting that certain erasures, corrections and annotations be made on the copy of Genesee Approved List No. 3, and to report the same to the General Land Office, which letter is found on pages 145 and 146 of the Record.

47. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 107, being Genesee Approved List No. 3, showing the erasures, corrections and annotations requested by the Commissioner's letter of May 19, 1854, with reference to the same, which letter is found on pages 146 to 148 of the Record.

48. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 108, being a letter from Commissioner Wilson to Governor Parsons, dated July 1, 1854, requesting that certain corrections be made in the copy of the Approved List No. 3, Sault Ste. Marie district, and that the General Land Office be notified of the corrections, which letter is found on page 148 of the Record.

49. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 109. being a letter from Governor Parsons to Commissioner Wilson, dated July, 1854, which acknowledges receipt of the letter of Commissioner Wilson of July 1, 1854 (Exhibit 108), and advises him that the corrections requested have been made, which letter is found on page 148 of the Record.

50. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 110, being Surveyor-General's List No. 1, Grand River district, from the State Land Office, so far as it relates to towns 18 north, 3 and 4 west, which exhibit is found on pages 149 to 153 of the Record.

51. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 111, being Approved List No. 1, Ionia district, from the State Land Office of Michigan, so far as it relates to towns 18 north, 3 and 4 west, which exhibit is found on pages 153 to 157 of the Record.

52. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 113, being the patent of the United States to the State of Michigan, known as Ionia No. 2, so far as relates to the lands in town 18 north and 4 west, which exhibit is found on pages 157 to 159 of the Record.

53. In holding that no error was committed by the trial court admitting in evidence over plaintiff's objection, Exhibit 114, being field notes of the resurvey of sections in township 18 north, range 3 west, involved in the declaration in this cause, which exhibit is found on pages 159 to 169 of the Record.

54. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 115, being a letter from Surveyor-General Noble to Commissioner Butterfield, dated April 21, 1852, referring to

the letter of the Commissioner of April 13. States that the certificate in the Kalamazoo list does not appear to admit of doubtful construction, and incloses a new certificate for the Grand River list to be substituted for the original, and that the lists as near as practicable be made up strictly in accordance with the instructions of the Commissioner; that the remaining lists would be made up leaving out the tracts sold prior to September 28, 1850, which letter is found on page 169 of the Record.

55. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 116, being a letter from Alexander F. Bell, Register of Ionia Land Office, to the Commissioner of the General Land Office, dated September 23, 1854, inquiring whether lands appeared to have been on the maps of the old survey to have been selected by the Surveyor-General as swamp lands, and not appearing on the maps of the resurvey and in the approved list as swamp lands, are subject to private entry at his office, which letter is found on page 169 of the Record.

56. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 117, being a letter from Commissioner Wilson to the Register of the Land Office at Ionia, dated October 3, 1854, and stating that he should regard all selections by the Surveyor-General as valid until furnished by him with lists designated, "In lieu of the originals in townships resurveyed and platted," and where lands have been approved according to the old plats, no action could be taken by the Register until the claim of the State has been rejected, which letter is found on page 170 of the Record.

57. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 119, being a letter from Commissioner Wilson to Governor Bingham, dated February 24, 1855, requesting the suspension of action on Ionia Approved Lists Nos. 2 and 3, be-

cause Surveyor-General had transmitted to the Commissioner certain lists in the Cheboygan district in townships resurveyed and platted, which lists he states, "abrogates and supersedes all lists of swamp lands heretofore made of the townships contained in it," giving a list of the town affected, which letter is found on page 171 of the Record.

58. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 121, being a letter from Commissioner Edmunds, dated June 18, 1864, referring to certain selections, stating that they were made from the field notes of the old surveys, and most of the selections in those towns were approved and patented to the State on the old surveys prior to the receipt of the selections based on the new surveys. Supplemental List D being such a list. And the office had decided that, having acted upon one, they would ignore the other, and, therefore, the original list based on the old surveys should govern in those townships, which letter is found on pages 173 and 174 of the Record.

59. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 123, being the plat or resurvey of township 18 north, range 3 west, in the State of Michigan, which plat is found opposite page 174 of the Record.

60. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 124, being Surveyor-General's Supplemental List No. 3, Grand River district, from the State Land Office, so far as relates to towns 18 north, ranges 3 and 4 west, which list is found on pages 175 to 177 of the Record.

61. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 125, being a letter from Surveyor-General Emerson to Commissioner Hendricks, dated May 12, 1858, transmitting supplemental lists of swamp selections in the Chebeygan,

Grand River and Saginaw land districts of townships resurveyed and platted since the dates of the last supplemental lists, which lists complete the swamp land lists, with the exception of certain towns yet requiring corrections, which letter is found on page 177 of the Record.

62. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 126, being a letter from Commissioner Hendricks to Surveyor-General Emerson, dated May 20, 1858, acknowledging receipt of the list referred to in the letter of May 12, 1858 (Exhibit 125), which letter is found on page 178 of the Record.

63. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 127, being Approved List No. 10, Ionia land district, from the State Land Office, so far as it relates to towns 18 and 28 north, range 3 west, which exhibit is found on pages 178 to 180 of the Record.

64. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 128, being a letter from Commissioner Edmunds to the Governor of Michigan, dated May 26, 1866, transmitting a copy of Approved List No. 10, Ionia district, and requesting the Governor to transmit his requests for patents for the lands contained in it, which letter is found on page 180 of the Record.

65. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 129, being a letter from Governor Crapo of Michigan to Commissioner Edmunds dated May 31, 1866, acknowledging the receipt of Approved List No. 10, Ionia district, and requesting that patents might issue for the same, which letter is found on page 180 of the Record.

66. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Ex-

hibit 130, being patent of the United States to the State of Michigan, No. 20, Ionia district, so far as it relates to townships 18 and 28 north, range 3 west, which patent is found on pages 181 to 182 of the Record.

67. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 131, being a letter from Commissioner Drummond to the Governor of Michigan, dated March 25, 1873, acknowledging receipt of a letter of the Governor's of the 4th inst., asking that certain lands be patented to the State as swamp lands, and advising him that the records show the lands to have been selected in 1852, and shortly afterwards approved, but never p nted to the State. Resurveys having been ordered for th ownships referred to, new lists were reported which do ot contain the descriptions mentioned, and are therefore not recognized by the office as swamp selections. Those in the township selected by the resurvey are suspended because contained in an Indian reservation, which letter is found on pages 182 and 183 of the Record.

68. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 132, being a letter from Commissioner State Land Office Clapp to Commissioner Burdett, dated April 15, 1875, transmitting a list of swamp and overflowed lands, contained in Supplemental List C, Cheboygan district, of the townships resurveyed, calling attention to the removal of the reservation for Indian purposes, and requesting that the list of lands be approved and patented to the State at an early day, which letter is found on page 183 of the Record.

69. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 133, being letter from Acting Commissioner Curtis to the Governor of Michigan, dated November 10, 1875, acknowledging the receipt of a letter of October 28, calling attention to a list of lands in townships 35 and 36 north, range

3 west, and stating that they being found free from conflict, they had been submitted to the Secretary of the Interior for approval to the State as swamp lands, which letter is found on pages 183 and 184 of the Record.

70. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 134, being Approved List No. 22, Traverse City district, the same covering towns 35 and 36 north, range 3 west, which exhibit is found on pages 184 to 187 of the Record.

71. In holding that no error was committed by the trial court in admitting in evidence, over plaintiff's objection, Exhibit 135, being a patent from the United States to the State of Michigan, No. 35, coverings descriptions in towns 35 and 36 north, range 3 west, which exhibit is found on pages 187 to 189 of the Record.

72. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 136, being a letter from Commissioner of the State Land Office Clapp to Commissioner Drummond, dated April 30, 1874, transmitting for examination a list of lands contained in Supplemental List No. 3, Grand River district, in townships resurveyed, requesting the approval of each parcel, and that patents be issued; or, if that cannot be done, the State may receive indemnity therefor. The list inclosed covers selections in towns 18 north and 3 west, and a large number of other towns, which exhibit is found on pages 189 to 193 of the Record.

73. In holding that no error was committed by the trial court in admitting in evidence, over plaintiff's objection, Exhibit 137, being a letter from Commissioner Burdett to Commissioner of the State Land Office Clapp, dated June 15, 1874, acknowledging the receipt of a list contained in a letter of Commissioner Clapp, of April 30, 1874 (Exhibit 136), and stating that as to certain townships the greater part of the selections were made and approved under the old survey, and

as to those the old selections must govern. That as to certain other of the descriptions a portion had been located by land warrants, and others had been approved to the State for railroad and canal purposes, and others sold prior to the swamp grant of September 28, 1850, and that other tracts appear to be vacant and would be submitted to the Secretary of the Interior for his approval, which letter is found on pages 193 to 196 of the Record.

74. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 138, being a letter of Clapp, Commissioner of the State Land Office, to Commissioner Burdett, dated August 12, 1875, referring to the letter of Commissioner Burdett, dated June 15, 1874 (Exhibit 137), requesting that the lands noted in the Commissioner's letter as appearing vacant might be submitted for approval without further delay, and inclosing a list of lands, which letter is found on pages 196 and 197 of the Record.

75. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 139, being a letter from Acting Commissioner Curtis to Commissioner of the State Land Office Clapp, dated September 13, 1875, acknowledging receipt of Commissioner Clapp's letter of August 12, 1875 (Exhibit 138), advising him that certain tracts were included in Ionia List No. 20, and that certain other of the tracts were submitted to the Secretary of the Interior, for approval on the 10th inst., which letter is found on pages 197 and 198 of the Record.

76. In holding that no error was committed by the trial court in admitting, in evidence over plaintiff's objection, Exhibit 140, being a copy of Approved List No. 20, Ionia district, so far as relates to certain descriptions in town 18 north, 3 west, which list is found on pages 198 and 199 of the Record.

77. In holding that no error was committed by the trial court in admitting in evidence, over plaintiff's objection, Exhibit 141, being a patent from the United States to the State of Michigan, No. 34, for certain swamp lands in town 18 north, 3 west, the same lands contained in Exhibit 140, which patent is found on pages 199 and 200 of the Record.

78. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 142, being a certificate of the Commissioner of the State Land Office, dated June 16, 1892, from which it appears that certain lands in towns 18 north, ranges 3 and 4 west, and other towns, are not found in any approved list, nor included in any patent of the United States to the State of Michigan on file in the State Land Office; and further, that no swamp lands in township 18 north, range 3 west, are included in any approved list on file in that office, except Ionia No. 1, No. 10 and No. 20, or in any patent, except patents No. 20 and No. 34, and reciting similar facts as to other lands not involved in the declaration in this case. Which certificate is found on pages 200 and 201 of the Record.

79. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 143, being a letter of the Register and Receiver of the United States Land Office at Detroit to the Commissioner of the State Land Office, dated September 10, 1877, transmitting a copy of a letter from the Commissioner of the General Land Office to the Register and Receiver, dated September 6, 1877, and advising the State that it has 60 days to appeal from the decision of the Department contained in this letter of the Commissioner referring to certain tracts of land included in homestead entries found in conflict with the claim of the State. Says that the lands were embraced in Supplemental List D., and stating that the lands were in towns approved and patented, based on the old survey, and that for that reason the claim of the State to the particular parcels had been

rejected, which letter is found on pages 201 to 202 of the Record.

80. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 144, being a letter dated June 26, 1880, from Commissioner Williamson to the Governor of Michigan, advising him of the receipt of a letter of the 17th inst. inclosing a list of lands in township 24 north, range 1 west, claimed as belonging to the State under the swamp grant, and stating that the list referred to was superseded by lists made on the resurveys, and as these lists do not include the lands claimed by the State, they were not recognized as swamp selections, and that the land on the odd numbered sections had all been certified to the State for railroad purposes, which letter is found on pages 202 and 203 of the Record.

81. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 145, being a letter dated July 27, 1881, from Governor Jerome to Secretary of the Interior Kirkwood, inclosing a list of lands which had been approved to the State, and requesting patents therefor, which letter and the list inclosed is found on pages 277 and 203 of the Record.

82. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 147, being a letter from Commissioner McFarland to the Governor of Michigan, dated August 27, 1881, acknowledging receipt of the letter of Governor Jerome of July 27, 1881 (Exhibit 145), stating in reply that the records of the office showed that certain of the descriptions had been selected and approved as swamp lands, but before patent had been issued resurveys had been made and a new list prepared, in which the parcels do not appear as swamp lands, and therefore they could not be treated as such. That another description had already been patented to the State, erroneously, as being land confirmed to purchasers under the United

States, under the act of March 3, 1857, and that certain of the remaining tracts would be patented to the State at an early day, which letter is found on page 204 of the Record.

83. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 147, being a letter from Governor Jerome to Commissioner of the General Land Office, dated March 20, 1882, inclosing a letter from the Commissioner of the State Land Office, together with the list of lands for which a patent was requested, a letter of the Commissioner of the State Land Office, dated March 18, 1882, asking the Governor to request patents on the inclosed, which letter and its inclosures are found on page 205 of the Record.

84. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 148, being a letter from Commissioner McFarland, to the Governor of Michigan, dated March 29, 1882, acknowledging receipt of the Governor's letter of the 20th inst. (Exhibit 147), stating that certain of the descriptions had been sold by the general government prior to 1850; that others of the tracts are reported as swamp selections, May 12, 1858, were November 12, 1867, selected for the Jackson, Lansing & Saginaw Railroad for railroad purposes, and the State's claim to the same lands under another grant would not be recognized. That another parcel does not appear on the plats of the government survey; that other parcels have not been selected as swamp lands, and that the remaining parcels do not appeaer in the lists found on the resurveys in the respective townships, and for that reason the request of the Governor cannot be complied with, which letter is found on page 206 of the Record.

85. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 149, being a letter from Commissioner Sparks to the Register and Receiver at Detroit, dated March 25, 1887,

stating that certain descriptions upon which homestead entries had been made were suspended for conflict with apparent claim of the State of Michigan under the swamp grant. Which descriptions were contained in Supplemental List D, transmitted after the resurveys in those towns, but in which towns the greater portion of lands had been carried into patents based on the old survey prior to the reception of the supplemental list, and that therefore the selections in the supplemental list would not be recognized, the claim of the State based on the supplemental list would be held for rejection, and they are requested to notify the State authorities of the usual time for appeal, which letter is found on pages 207 and 208 of the Record.

86. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 150, being a letter from Commissioner Sparks to Register and Receiver at East Saginaw, dated November 8, 1887, stating that as to a certain description embraced in a cash entry at that office it appears to be claimed by the State of Michigan as swamp lands, which claim is founded on a selection made December 24, 1852, subsequent to which time a resurvey was made and a new list prepared, which did not contain the description involved. The field notes do not show the parcels to be swamp and over-flowed within the meaning of the grant, not being approved or patented to the State, claim of the State is held for rejection, and the Register and Receiver are requested to notify the Governor of the State, which letter is found on page 208 of the Record.

87. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 151, being a letter from Commissioner Wilson to the Register and Receiver at Ionia, dated January 30, 1868, and Exhibit 151 A, being a letter from Commissioner Wilson to the Register and Receiver at Ionia, dated July 30, 1869.

Exhibit 151 being the decision of the Commissioner reject-

ing the entries of Addison P. Brewer and others for lands in 18, 19 and 20 north, range 3 west, their entries being contested by the Flint & Pere Marquette and Jackson, Lansing & Saginaw Railroad Companies, and Messrs. Remick and Merrill. These lands were selected by the State in 1852 as swamp lands, and in 1857 a resurvey was made of the townships, and a new list prepared in 1858. The railroad companies claim the land under the Act of Congress of June 3d, 1856. The lands in dispute were within the fifteen-mile limit of the several roads, and the indemnity selections were certified to the roads in 1859, 1862 and 1864. Mr. Remick in 1854 and Mr. Merrill in 1863, had applied to enter the lands, at the United States Land Office. The applications of Brewer and others were made at the United States Land Office in 1866. The Commissioner holds that at the time of the adjustment of the railroad grant, and at the time of the application for entry of Messrs. Remick and Merrill, the selections of the State in 1852 operated as a withdrawal of the lands from public entry, and not subject to disposal under the terms of the railroad grant. The lands being resurveyed and a new list made, the selections of the State must be considered as having been relinquished, and the lands should now be restored to market after public notice and the locations canceled. Parties were allowed thirty days in which to appeal to the Secretary of the Interior.

Exhibit 151 A advises the Register and Receiver of the affirmation of the decision of the Commissioner by the Secretary of the Interior, and directs them to return the scrip, cash or warrants upon which the entries were made to the proper parties, note the cancellation of the entries on the book of the office, and to offer the lands at public sale in the usual manner, which exhibits are found on pages 209 to 213 of the Record.

88. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhi-

bit 152, being a letter from W. R. Wood, chief clerk of the Surveyor-General's office, dated May 13, 1858, stating the Surveyor-General left day before with maps, field notes, etc., of the surveys in Michigan to be transferred to the State authorities, and that he had mailed to the Commissioner's address the original supplemental lists in the Cheboygan, Grand River and Saginaw land districts, made up from the resurveys since the date of the last supplemental lists for those districts, which latter lists had been transferred to Michigan authorities in May, 1857, which letter is found on page 213 of the Record.

89. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 153, being from the State Land Office of Michigan, original Supplemental List E of swamp lands in the Cheboygan districts, which list is found on pages 213 and 215 of the Record.

90. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 154, being from the State Land Office of Michigan, Approved List No. 11, of swamp lands in the Ionia district, which exhibit is found on pages 215 to 218 of the Record.

91. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 155, being a letter from Governor Crapo to Commissioner Edmunds, dated June 20, 1866, acknowledged the receipt of a copy of Approved List No. 11, and requesting that patents issue for the same, which letter is found on page 218 of the Record.

92. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 156, being copy of patent of the United States to the State of Michigan, No. 22, covering lands in towns 28 north, range 4 west, and 24 north, range 9 west. The same lands

as are included in Approved List No. 11 (Exhibit 154), which patent is found on pages 218 to 220 of the Record.

93. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 157, being a letter of James W. Sanborn, Commissioner of the State Land Office to Governor Wisner, dated April 5, 1859, inclosing to the Governor a copy of the letter of Commissioner Hendricks to Treadwell, Commissioner of the State Land Office, dated December 18, 1858, and lists of towns inclosed in the latter letter. Also other documents showing the difference in the acreage of swamp lands under the old and the resurveys. In certain towns showing a decrease by the resurvey of over 78,000 acres, and in the lands already patented to the State a difference of 235,000 acres. Other documents are included showing the difficulty in locating the lands described in the patents by reason of the discrepancies in the two surveys, and submitting the whole matter to the Governor for his advice in the premises, which letter is found on page 221 of the Record.

94. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 159, being a letter from Samuel S. Lacey, Commissioner of the State Land Office, to Commissioner Edmunds, dated July 10, 1861, inclosing Statement B, as attached to the report contained in Exhibit 158, asking when the lands appearing to have been unpatented may be patented to the State of Michigan, which letter is found on page 225 of the Record.

95. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 161, being a copy from the records at Washington of the Surveyor-General's List No. 1, Grand River district, so far as it covers towns 18 north, range 3 and 4 west, which exhibit is found on pages 231 to 234 of the Record.

96. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Ex-

hibit 162, being a copy from the General Land Office of Ionia Approved List No. 1, so far as it covers towns 18 north, ranges 3 and 4 west, which exhibit is found on pages 234 to 236 of the Record.

97. In holding that no error was committed by the trial court in admitting in evidence over plaintiff's objection, Exhibit 163, being a tax deed from the State of Michigan by the Auditor-General of the State of Michigan, to C. A. Rust, dated July 30th, 1892, issued in pursuance of a sale of the lands in controversy, for the delinquent taxes for the year 1888, at a sale thereof made May 4th, 1891, for the sum of $350.24, which exhibit was produced in evidence at page 240 of the Record, and is found in full at page 241.

98. The said Circuit Court of Appeals erred in holding that that there was no error committed by the trial court in rejecting and excluding on plaintiff's offer, the records and files in the case of the *United States vs. Henry Nicholson et al.*, in the United States Circuit Court for the Eastern District of Michigan, being Exhibit 175A. This was an action brought by the United States against Henry Nicholson and his bondsmen, based on the contract of Nicholson with Surveyor-General Haines, dated the 20th day of July, 1838, for the survey according to the laws of the United States and the instructions of the Surveyor-General of towns 18, 19 and 20 north, ranges 1, 2 and 3 west, and the bond given in pursuance of that contract, dated the 20th of July, 1838, alleging as breaches of the condition of the bond that Nicholson as deputy surveyor did not well and truly and faithfully, according to the laws of the United States and the instructions of the Surveyor-General, make and execute the surveys required under the terms of his contract, and did not return the field notes of such a survey, and that he did not, with his chainmen and axemen and flag bearers, lay out and subdivide the towns in the sections as required to do by the contract. The plea was one of performance, and that if there had been a non-perform-

ance, full payment and satisfaction had been made by the defendants, and that the bond was released and discharged. On the trial of the case before a jury on the 25th day of November, 1850, there was a verdict in favor of the defendants, which records and files, so far as they have a bearing on this issue, are found on pages 259 to 264 of the Record, (opinion p. 345).

99. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding the records and files in the case of the *United States vs. Henry Brevoort et al.*, in the United States Circuit Court for the Eastern District of Michigan, being Exhibit 175B. This action was in the same form as the action against Nicholson, set forth in the preceding assignment, his contract bearing date December 13, 1839, covering towns 24, 25, 26 and 27 north, ranges 1, 2 and 6 west, and towns 25, 26 and 27 north, ranges 3, 4 and 5 west, and towns 24, 25 and 26 north, range 7 west. Declaration alleges in substance a non-performance of the contract in accordance with the laws of the United States and the instructions of the Surveyor-General, and the plea is that the contract was fully performed. On a trial of the cause before a jury on the 23d day of November, 1850, there was a verdict for the defendants, which records and files, so far as they bear upon this issue, are found on pages 264 to 271 of the Record.

100. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding from evidence on the offer of plaintiff, Exhibit 176, being a letter dated December 13, 1850, from J. M. Howard to Secretary of the Interior Stewart, reciting the institution of suits in the United States Court against Deputy Surveyors Nicholson, Brevoort, and others, at the suggestion of Lucius Lyon, the late Surveyor-General.

Mr. Howard was the counsel employed in the cases for one of the defendants, Mr. Mullett, and gives the history of

the trial of the case against Brevoort, and alleges that there was not the slightest proof that the returns of the surveys by Brevoort were fraudulent or fictitious, as had been reported, and states that the government relied upon the testimony of Wm. A. Burt, the deputy surveyor, who had made an examination, under instructions of Surveyor-General Lyon, of the surveys in controversy, in April, 1849, and the following months, and indicates that Mr. Burt received, as his compensation for these surveys, $2,500 more than he was by law entitled to receive, and from his testimony it appeared that he found many of the old monuments of the old surveys, and that a large portion of the country examined had been run over by fire, which had consumed most of the timber, and the same facts were proved by other witnesses, which letter is found on pages 271 to 272 of the Record.

101. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding from evidence on offer of plaintiff, Exhibit 177, being a letter from United States District Attorney Bates to Hon. James L. Conger, dated February 10, 1851, referring to the trial against Brevoort and Mullett; states that the cause was tried in the previous December, and had been taken to the Supreme Court on bill of exceptions, but the evidence of the trial was conclusive that the surveys had been faithfully fulfilled, and that eventually the defendants would have a verdict, which exhibit is found on page 272 of the Record.

102. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding from evidence on the offer of plaintiff, Exhibit 178, being a letter from United States District Attorney Bates to Commissioner Butterfield, dated February 11, 1851, reciting in substance the facts stated in Exhibit 177, referred to in the preceding assignment, which letter is found on page 273 of the Record.

103. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding from evidence on the offer of plaintiff, Exhibit 179, and the inclosures contained in it, being a letter from Chas. Noble, Surveyor-General, to Commissioner Butterfield, dated February 28, 1851, inclosing two letters of Henry Brevoort, Jr., making charges against the late Surveyor-General Lucius Lyon. The first letter is dated February 11, 1851, and charges that Lyon had been given contracts for districts too large for him to execute in person, and had let them out to other persons, so that he could not run and mark the lines as he was required to do by the general instructions governing surveying contracts. That he did not accompany his surveying parties to the districts contracted, but remained at Detroit and Lansing sufficient time so that he had not given over five or six weeks to the field work covvered by his contracts, and that while the instructions required the surveys to be made by the use of Burt's Solar Compass, Lyon had only one such instrument for the entire party, and that he had failed to pay numbers of the men who were in his employ. The second letter is dated February 14th, 1851, replying to a letter of the 7th inst., from Noble to Brevoort, requesting him to furnish the proof of his statement, in which Mr. Brevoort says he is ready to produce competent testimony in any court whenever called upon to do so, which letters are found on pages 274 to 276 of the Record.

104. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding from evidence over plaintiff's objection, Exhibit 180, being a letter from Wilson, Commissioner, to Surveyor-General Noble, dated January 15, 1853, stating that the order to determine what action should be had with reference to the Surveyor-General's office in view of the Act of Congress of 1840, relative to the closing of the office, suggests that the chief clerk, Mr. Frost, be sent to Washington to per-

sonally give such information and receive such instructions as are desired, which exhibit is found on page 276 of the Record.

105. The said Circuit Court of Appeals erred in holding that there was no error committed by the trial court in rejecting and excluding from evidence, Exhibit 181, being a letter from Surveyor-General Noble to Commissioner Wilson, dated February 14, 1853, stating that he has prepared in the limited time allowed him a schedule of the field notes and office work yet to be completed in his office, and that the bearer, Mr. Frost, had been detailed to present the same, and that he would give such further information as he deemed important for the Commissioner's office. Attached to the letter is the schedule referred to, showing ten townships of resurveys not yet completed, and seven townships in the Upper Peninsula unsurveyed, and seven townships the surveys of which made in 1851 were suspended, and that a number of towns yet to be platted and the notes transcribed, which exhibit is found on pages 277 and 278 of the Record.

106. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 4, which request is as follows:

The act of Congress made it the duty of the Secretary of the Interior to identify the lands granted, and when he tendered to the State of Michigan the election to receive the lands granted, according to the field notes of the government survey, as the basis of identification, in accordance with the instructions under date of November 21, 1850, which method of identification was accepted by the Legislature of the State by an act passed and approved June 21, 1851, the method so tendered and accepted became a compact between the State of Michigan and the United States, and was binding upon both parties (Record p. 287.)

107. In holding that there was no error committed by the

trial court in refusing to give plaintiff's request to charge No. 5, which request is as follows:

The Secretary of the Interior having approved the selections contained and designated by legal subdivisions in a list called the Ionia Land District No. 1, over his hand, and bearing date the 27th day of October, A. D. 1853, and made a plat thereof, under and in accordance with said act of Congress, and forwarded said list of legal subdivisions and plat to the Governor of the State of Michigan,, and suggested that the Governor request patents therefor from the United States, and the Governor having requested patents to be issued therefor on the 31st day of January, 1854, and the legal subdivisions in issue in this suit being contained in and designated as swamp lands in said list and plat as swamp lands inuring to the State of Michigan under said act of Congress, the title to the legal subdivisions described in the plaintiff's declaration in issue in this suit became fully identified and fully vested in the State of Michigan (Record p. 287.)

108. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 6, which request is as follows:

That after making said list and plat and forwarding them to the Governor of the State of Michigan, the work of issuing the patents therefor, as requested by the Governor, was merely ministerial, and the Secretary of the Interior could not deprive the State of Michigan of such lands by neglecting or refusing to issue patents therefor (Record, p. 287.)

109. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 7, which request is as follows:

The act of Congress approved March 3, 1857, confirmed to the State of Michigan all selections embraced in the Approved List No. 1 of the Ionia Land District, which were, at the date of said act, vacant and unappropriated, and not interfered with by previous settlement under the laws of the

United States; and the uncontradicted evidence in this case showing that the lands described in the plaintiff's declaration were embraced in such selections and contained in the approved list and plat made by the Secretary of the Interior, and were, on the 3d of March, 1857 vacant, unappropriated and not interfered with by previous settlement under the laws of the United States, were by that act confirmed to the State of Michigan, such act of confirmation operating as a grant of lands embraced in such approved list and plat (Record pp. 287, 288.)

110. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 8, which request is as follows:

If such approved list made and approved by the Secretary of the Interior was, on the 3d of March, 1857, withheld from patent because of the resurveys having been ordered or made, and if he had any corrective or other authority over such list to alter and act upon it, then the act of March 3, 1857, applied to such list and confirmed the lands designated therein to the State of Michigan and deprived the Secretary of the Interior of all power in the premises save to cause patents to such lands to be issued to the State of Michigan (Record page 288.)

111. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 9, which request is as follows:

The testimony in the case fails to show that there had been any such adjustment of the swamp land grant between the State of Michigan and the United States, as in law deprives the State of the title of the land granted to it under the act of Congress of September 28, 1850, and claimed in this suit (Record p. 288).

112. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 10, which request is as follows:

The testimony in this case fails to show that there has been any estoppel as against the State to forbid its grantee and those claiming title from the State to rely upon the act of Congress granting the lands involved in the issue in this case to the State (Record p. 288).

113. In holding that there was no error committed by the trial court in refusing to give plaintiff's request to charge No. 11, which request is as follows:

Upon the whole record and the testimony given you in the open court, your verdict should be for the plaintiff (Record, p. 288).

114. In holding that no error was committed by the district judge charging the jury as follows:

"I will say to counsel that, as it lies in my mind, there is no substantial distinction between this case and the first, except that the lands in question are found in an approved list, which was subsequently revoked and canceled by the Secretary of the Interior, and the question that arises upon the power of the Secretary to order the resurvey or revoke any certification of lands made by him before the actual issue of patents. If he had such power, then, of course, the title of the defendants must prevail in this action, and I have no doubt the Secretary had the power not only to order the resurvey as I have held before" (Record p. 288).

115. In holding that no error was committed by the district judge charging the jury as follows:

"But at any time before the issue of patents, if he discovered that there was fraud or mistake, or if he was satisfied upon the evidence before him that the lands were not of the character granted by the act of September 28, 1850, it was his duty, notwithstanding he had certified them to the State by approval of the list, to revoke that certification, cancel it, and the lands remain unaffected. And of course, if the patents had been issued, it was quite probable that this action would have been conclusive on the rights of the parties, that

patent, not having been issued, and the Secretary having decided, as it was his province to decide on the facts before him, that the lands were not of the character granted, I think the title of the defendants must prevail" (Record pp. 288, 289).

116. In holding that no error was committed by the district judge charging the jury as follows:

"With reference to the act of 1857, my impression is very strong. Both from the reading of the act and from what I have seen in the decisions of the Department of the Interior, where the question has arisen once or twice that the act was primarily intended for those selections of land made by the States themselves pursuant to the surveys which they had made, and had no application, at least it wasn't originally intended for and does not apply to those lands designated as swamp lands under the surveys of the United States, and it certainly has no application to those lands, the lists of which were set aside and canceled, and of which a resurvey was ordered by the Secretary of the Interior, and the act of 1857 could not, in my judgment, even if it intended to apply to all the States alike, it could not revive selections which had been so far canceled by the Secretary of the Interior in the line of his duty as to order a resurvey of those lands" (Record p. 289).

117. In holding that no error was committed by the district judge directing a verdict for the defendants, as requested by defendant's counsel (Record p. 289).

118. The Circuit Court of Appeals erred in holding that the Act of Congress of March 3, 1857, did not apply to the list known as Approved List No. 1, Ionia, and did not confirm the selections contained in said list to the State of Michigan (Record p. 344).

119. The Circuit Court of Appeals erred in holding that the Secretary of the Interior had no authority to enter into the arrangement with the State of Michigan to adopt the field-notes of the United States survey on file in the Surveyor-

General's Office, if by so doing lands the greater part of any government description thereof which were not swamp would be included in such selections (Record p. 340).

120. The Circuit Court of Appeals erred in holding that the Secretary of the Interior could not assume any obligation by agreement with the State which would bind him in the discharge of his duty to the General Government (Record p. 340).

121. The Circuit Court of Appeals erred in holding that by the act in question the proceedings of his department extended from the first step to be taken for the identification of the lands to the issuance of the patent to the State, whereupon they became subject to the disposal of the legislature thereof, and that when the patent was required by the act it would seem that Congress intended the Secretary's supervision to continue until all things contemplated by the act had been accomplished by its issuance. (Record p. 340, 341).

122. The Circuit Court of Appeals erred in holding "that it was not the intention of this act" (the act of March 3, 1857) "to over-ride the general power of the Secretary of the Interior to correct frauds and mistakes in the preparation of the lists thereby confirmed, and that upon the just construction of the act such frauds and mistakes remain subject to correction" (Record p. 344, 345).

123. The Circuit Court of Appeals erred in holding that the act of March 3, 1857, was not intended to include a list which was in the situation of the one under which the plaintiff claims (Record p. 344).

124. The Circuit Court of Appeals erred in holding that it was not intended by the Secretary of the Interior nor expected by the State that the selection of swamp lands certified and transmitted to the Governor on the 13th day of January, 1854, and which included the lands claimed by the plaintiff, should be necessarily final, but that it was intended to be subject to correction to the extent that the facts shown by the

resurveys should require, and that upon its being proven by the resurveys that these lands were not swamp, it was competent to supersede the selection by a correct one (Record p. 340).

125. The Circuit Court of Appeals erred in holding that in this case the selections had been made and approved under a mistake of facts induced by false and fraudulent surveys, whereby lands had been certified which were not swamp, and to which the State had no right whatever, and the rights of no third party had intervened, it was competent for the Secretary on discovering the error at any time before issuing the patent to correct the wrong by recalling his certification: "not upon mere error of judgment, but that character of mistake which affords a ground of relief in a court of equity" (Record p. 340).

126. The Circuit Court of Appeals erred in holding, "the Secretary under this grant would exercise his powers consistently with his general authority over the public lands. He had plenary and exclusive power to direct the surveys, to cancel such as he found erroneous, and to order resurveys as the necessities of every occasion should require" (Record p. 340).

127. The Circuit Court of Appeals erred in holding that the Secretary of the Interior "had the power and was charged with the duty of supervising the method by which granted lands should be passed to the beneficiary. If mistakes were committed by his subordinates, the results of which, if suffered to stand, would be to accomplish a wrong, he had power to correct them. If they were made by himself, his duty was as plain and his power no less ample" (Record p. 340).

128. The said Circuit Court of Appeals was in error in holding that the grant under the act of September 28, 1850, had been adjusted between the State of Michigan and the United States, and that the State had received substantially all of the lands to which it was entitled (Record p. 336).

129. The Circuit Court of Appeals erred in holding that, "in effect, the plaintiff's contention amounts to this: that no matter how gross the error or from what cause proceeding, the Secretary of the Interior, when once he had certified a list of lands as falling due to the State under the grant, was without power to rectify it though no patent had been issued and the rights of no third party had become involved by purchase from the State, and further that the Secretary had no power to do this with the consent of the State" (Record p. 337.)

130. The Circuit Court of Appeals erred in stating (after setting out the letter of the Commissioner of the General Land Office of date January 13, 1854, to the Governor of Michigan), "in the margin of the descriptions contained in town 18 north, of range 3 west, was written the letter 'F' which was explained in the accompaning certificate to mean that the survey of that township had been reported as fraudulent" (Record p. 333).

No such letter "F" was entered in the margin or any other place upon the Approved List No. 1 transmitted to the Governor.

131. There is also error in this, to-wit: that by the record aforesaid it appears that the judgment aforesaid in form aforesaid was given for the said defendant, Charles A. Rust, survivor, etc., and against the said Michigan Land and Lumber Company, limited, whereas by the law of the land the said judgment ought to have been given for the said Michigan Land and Lumber Company, limited, and against said Charles A. Rust, survivor, etc.

Objections were taken from time to time on the trial of the cause to the reading in evidence of the reports of the General Land Office, State Land Office, and other public documents and records. Inasmuch as the courts will take judicial knowledge of the contents of such documents, and is at liberty, even though they are not formally offered in proof nor avowed in the pleadings, to consult them, counsel do not

deem it necessary to specifically rely upon any objection to their admission, and questions relating to the statements contained in them will be disposed of without special reference to them under this head.

Heath vs. Wallace, 138 U. S., 573, 584.
Jones vs. U. S., 137 U. S., 202, 212–216.

## QUESTIONS FOR ARGUMENT.

I.

The act of Congress of September 28, 1850, granting swamp lands to the several States was a grant *in presenti*, passing title to the lands as of its date, but requiring identification of the lands to render the title perfect, and the Secretary of the Interior was by the act constituted a special tribunal to whom the determination of the matter was intrusted.

This question is raised by assignments of error 113, 117, and 131.

II.

When the Secretary of the Interior had certified and approved the list of lands known as Ionia List, No. 1 as swamp lands inuring to the State of Michigan, (which list contained the lands in question), and had caused a map to be prepared of the lands so listed and the same had been transmitted to the State, and the Governor having requested patents to issue for the lands included in said list, the identification was complete, and the title of the State to such lands became and was perfect and absolute as of the date of the grant, and the issue of a patent therefor by the United States was not necessary in order to perfect the title to the lands thus identified.

This question is raised by assignments of error 1, 2, 3, 106, 107, 108, 117, 119, 120, 121, 124, 125, 129, 130.

III.

The Secretary of the Interior having identified the lands

to the State of Michigan, as required by the act of September 28, 1850, was thereafter without power to annul, cancel or revoke such action, nor could it be done by his successors, or any other officer of the General Land Office, and he could not by any such attempted acts, withdraw the lands from the operation of the grant.

This question is raised by assignments of error 107, 114, 115, 121, 124, 127, 129, 130.

IV.

The title to the lands in controversy becoming vested in the State by the identification by the Secretary of the Interior, it cannot be divested by any act of the Secretary of the Interior under his authority over the public surveys, and the testimony offered relating to resurveys and the proceedings founded upon them, was immaterial and should have been rejected.

This question is raised by assignments of error noted under the foregoing propositions and assignments 126, 23, 26, 30 to 40, 53, 55 to 67, 73, 80, 82, 84 to 87.

V.

The Act of Congress of March 3, 1857, operated to confirm to the State, the title to the lands included in the list Ionia No. 1, and after the date of the act, the duty of the Secretary of the Interior in the premises was the purely ministerial one of issuing approved lists and patents therefor.

This question is raised by assignments of error 109, 110, 116, 118, 122, 123, 125.

VI.

The State is not estopped by its acts or conduct relative to the resurveys within the State or of the lands in controversy and herein of the testimony bearing on resurveys both prior and subsequent to 1850, and the effect of lists of land

founded on such resurveys, and further of the effect of the act of March 11, 1861, of the State of Michigan.

This question is raised by assignments of error 4 to 21, 23, 26 to 96, 103 to 105, 114, 116, 121, 122, 123, 124, 126, 111 and 128.

VII.

The tax title acquired by defendant after suit was commenced was not admissible in evidence under the pleadings.

This question is raised by assignment of error 97.

VIII.

The files and records relating to the cases of *United States vs. Nicholson*, and *United States vs. Brevoort* and correspondence relating to the same should have been admitted in evidence.

This question is raised by assignment of error 98 to 102.

## ARGUMENT.

I.

THE ACT OF CONGRESS OF SEPTEMBER 28, 1850, GRANTING SWAMP LANDS TO THE SEVERAL STATES, WAS A GRANT *in presenti*, PASSING THE TITLE TO THE LANDS AS OF ITS DATE, BUT REQUIRING IDENTIFICATION OF THE LANDS TO RENDER THE TITLE PERFECT, AND THE SECRETARY OF THE INTERIOR WAS BY THE ACT CONSTITUTED A SPECIAL TRIBUNAL TO WHOM THE DETERMINATION OF THE MATTER WAS INTRUSTED.

This proposition is conceded by the Circuit Court of Appeals (Opinion, Record p. 337) and we do not understand it to be seriously disputed by defendant.

Wright vs. Roseberry, 121 U. S., 488, 509.

The second section of the act of September 28, 1850, (9 Statutes at Large, p. 519), makes it "the duty of the Secre-

tary of the Interior as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described," and transmit the same to the Governors of the several States.

The case above cited and the cases there reviewed have determined that this constituted the Secretary a special tribunal for the purpose of identifying the lands inuring to the States under the grant, whose duty it was in the first instance to ascertain the character of the lands as swamp and overflowed, and to furnish the State with the evidence of it, and although the State could not be deprived of its lands by the inaction of of the Secretary of the Interior, yet she "was not obliged to proceed in their assertion in the absence of such identification."

United States vs. Louisiana, 123 U. S., 32, at 37.

The Secretary of the Interior was, as to most of the States, without satisfactory evidence within his control, to enable him to at once prepare the lists and plats provided for by the act.

Railroad Company vs. Smith, 9 Wall, 95, at 100.
Emigrant Company vs. County of Wright, 97, U. S. 339, at 340.
Martin vs. Marks, 97 U. S., 345, at 347.

And he was obliged to resort to various expedients for the purpose of ascertaining the character of the lands granted.

The third section of the act provided: "That in making out a list and plats of the land aforesaid, all legal subdivision the greater part of which is wet and unfit for cultivation shall be included in said list and plats; but when the greater part of the subdivision is not of that character, the whole of it shall be excluded therefrom."

What should be the evidence from which to make this finding?

The history of the passage of the act of 1850, as dis-

closed by the Congressional Globe, shows that it was a general notion, that there would be little if any difficulty in determining the lands which would pass to the States under the grant, as it was considered that the words "swamp lands" and "overflowed lands" were somewhat technical terms which were well understood in the General Land Office, and which were used by the Surveyor-General and deputy surveyors in the field notes and plats made under the United States surveys; and the words "made unfit thereby for cultivation" enlarged these terms. The discussions may be found as follows:

> The Congressional Globe, 31st Congress, 1st session pages 88, 232, 1191, 1848, 1849, 1999.

The Land Office was consulted at the time and some amendments were made at its suggestion.

A review of the matter is quite fully set forth in executive document number 86 of the Senate, 34th Congress, first session.

Under date of June 15, 1856, in response to a resolution of the Senate of the 7th of May, 1856, Secretary McClelland submitted a report from the Land Office on the subject. On page 3 it is stated, "It was originally believed that the plats of this office afforded sufficient evidence upon which to base the selections under the law. Indeed, the bill as passed by the Senate in the early part of September, 1850, granted *only such lands as were designated on the plats of this office as swamp lands*. But the law was amended by the committee on public lands of the House of Representatives after communication with this office, and this provision was removed; the law as passed on the 28th of September, 1850, is made to grant, 'all those swamp and overflowed lands rendered thereby unfit for cultivation,' without any restriction as to the source from whence this information is to proceed."

"Careful examination had already demonstrated that the

plats of this office did not afford the evidence requisite to the proper adjustment of the grant, and upon the knowledge of this fact being brought to the attention of Congress, through a letter of the 17th of September, 1850, to Hon. R. W. Johnson, the law was amended so as to *embrace other lands than those shown to be swamp by the field notes of survey.*"

The second section of the act is then referred to, and pointed out that no appropriation was made to carry out the act by an actual survey, and it is then stated: "It was clearly the design of Congress that the selections should be made by the Secretary of the Interior from the field notes and plats of survey, *so far as the same should afford the requisite evidence of the character of the lands.* But to have attempted the execution of the law upon this basis only, *in view of the known incompleteness of those records and of the very general terms in which the grant was made*, would have been manifestly unjust to the States designed to be benefited by the law."

"It was therefore decided, after mature deliberation, to enlarge upon the original plan, with a view to the more equitable adjustment of the grant, and as there was no provision to meet the expense of the examination by the United States officers, it was determined that the States should be called upon to furnish the lists of the swamp lands, accompanied by evidence of their character, which should be submitted to the scrutiny of government officials, and which, if satisfactory, should be considered as establishing the claim of the State. *Hence, the embodiment in the circular of instructions of November 21, 1850, of the rule that where the field notes of survey indicated the lands to be swamp, they should be so regarded,* and that at the same time others might be selected, and proven by the evidence of credible and disinterested witnesses."

The Commissioner in his report for 1850, says "It was decided *with your approbation*, to charge the Surveyors-General" with the duty of making out the preliminary lists, and

full instructions were issued under date of November 21, 1850.

Extract from report Exhibit 2 Record p. 16.
Exhibit 3 and A. Record p. 16-17.

The letter of November 21, 1850, submitted two methods as a basis of determining the lands to which the State was entitled: It could adopt the field notes of the surveys on file in the office of the Surveyor-General as a basis of selection, or it could furnish to the Surveyor-General other satisfactory evidence that the lands were of the character granted by the act. The Land Office considered the field notes to be "the only reliable data" in its possession from which the lists could be made out (Exhibit 3A. p. 18). The method offered of having the Surveyor-General prepare lists from the field notes had been recognized by Congress in its grant of swamp lands to the State of Louisiana in 1849.

9 Statutes at Large, 352.

The Governor received a copy of the instructions of the Commissioner of the General Land Office to the Surveyor-General from both the Commissioner and the Surveyor-General, and entered into correspondence with the Surveyor-General as to which in his opinion would be deemed the better method for the interests of the State.

Butterfield, C. G. L. O., to Governor, November 21, 1850. Exhibit 3, p. 16.
Noble, S. G., to Governor, December 6, 1850. Exhibit 4, p. 19.
Governor to Noble, S. G., December 20, 1850, Exhibit 5, p. 19.
Noble, S. G., to Governor, January 3, 1851, Exhibit 6, p. 20.

The Governor submitted the matter to the Legislature of 1851 by his annual message, an extract of which is given in

the Record (Exhibit 7, p. 21), and the Legislature by its act approved June 28, 1851, enacted, "That they adopt the notes of the surveys on file in the Surveyor-General's office as the basis upon which they will receive the swamp lands granted to the State by Act of Congress, September 28, 1850."

Laws of Michigan of 1851, p. 322, Appendix Number One.

It is submitted that it was entirely competent for the Secretary of the Interior as being the person, or the special tribunal which must determine the character of the lands, to indicate to the State the character of the proof which would be accepted as satisfactory. This is practically conceded by the Circuit Court of Appeals. (Opinion, Record, p. 337.)

The election to adopt the field notes as the basis of selection, has been acted upon continuously from that time to the present, and has been constantly recognized by the land department in its decisions as to other States as well as the State of Michigan.

Noble, S. G., to Butterfield, C. G. L. O., June 18, 1851, Exhibit 10, p. 23.

Wilson, C. G. L. O., to Goodrich, April 25, 1855, Exhibit 19, p. 28.

Hendricks, C. G. L. O., to Goodrich, December 13, 1855, Exhibit 20, p. 28.

Hendricks, C. G. L. O., to Governor Bingham, December 13, 1855, Exhibit 21, p. 29.

Wilson, C. G. L. O., to Governor, May 21, 1860, Exhibit 22, p. 30.

Hendricks, C. G. L. O., to Treadwell, C. S. L. O., December 22, 1858, Exhibit 23, p. 31.

Drummond, C. G. L. O., to Edmonds, C. S. L. O., December 27, 1871, Exhibit 24, p. 34.

Williamson, C. G. L. O., to Reg. and Rec., September 6, 1877, Exhibit 25, p. 34.

Lester's Land Laws, Vol. 1, pp. 553, 571.

Kirkwood, Sec., to McFarland, Commissioner, 1 L. D. Dec., 514.

Ohio Swamp Grant, 3 L. D. Dec., 390.

Cushing vs. State of Michigan, 4 L. D. Dec., 415.

Secretary McClelland, July 7, 1855, in a letter to the Commissioner, says, in speaking of the due proof required where selections were made under the swamp land grant by the State, and of the unreliability of such selections: "This principle is not to be regarded as extending to land shown by the field notes to be swampy, your office having, it is understood, regarded such indications as conclusive" (1 Lester, 552).

And again, on October 4, 1855 (1 Lester, 553), he said, with reference to selections in Wisconsin, which State had adopted the field notes as a basis: "Your office has decided, upon the principle early adopted in reference to these selections, and applied, it is believed, in all the States to which the grant of these swamp lands extended, that the field notes of survey were to be regarded as conclusive upon the subject, and the department feeling no disposition to change this principle, nor interfere with the various cases already determined upon its basis, confirms the action had by you in this particular case, especially, as in the case in the same State to which you refer in your letter, the action recommended therein by your office, was adopted by the department, with a full knowledge that it was thereby sanctioning this principle, and in effect deciding the very question now specially presented in Mr. Winan's appeal." Mr. Winan's appeal was based upon the proposition that the lands were not, in fact, swamp.

Commissioner Hendricks, in a communication to the Secretary of the Interior, January 22, 1858 (1 Lester, 559), in answer to an inquiry made by the Secretary of the Interior, which desired him to report whether in his opinion in bringing to a close the grant of September 28, 1850, in cases of selections reported to his office since the 3d of March, 1857, and in cases where the selections yet remained to be made, the general instructions of November, 1850, were sufficient and should be adhered to, or should new or additional regulations be adopted, stated that in a communication made to the

Governor of Arkansas with reference to the swamp land selections, it was stated: "In all cases where the plats and field notes represent the lands as swampy, or subject to such overflow as to render them unfit for cultivation, they belong to the State, under the law, and will be so certified. * * * If said records clearly indicate the swampy character of lands, then they are incontrovertible, and your certificate of approval is based thereon." He further said that, "It should be observed that in the States of Michigan and Wisconsin the field notes of the surveys were adopted by the authorities as the basis upon which they would accept the grant; and the action of the Surveyors-General of those districts is confined to the indications expressed in the field notes. In view, therefore, of the very clear and definite character of the explanatory instructions above, and further, that the authorities of the States affected by the grant have made no objections to the instructions, I cannot perceive that any additional instructions and regulations are required. Nor does the act of 3d March, 1857, present to me any particulars requiring a departure, or any necessity for additional instructions to be issued to those already established, relating to the selections made and reported to this office since the passage of that act, or to those remaining to be made."

Secretary Thompson, to the Commissioner, August 1, 1859 (1 Lester, 571), speaking with reference to the claims made by the State of Wisconsin to be allowed to survey swamps not shown to be such by the field notes of the United States survey, is quite suggestive with reference to the question under consideration. He points out the objections to such a course, and the inevitable result which would ensue, viz., delay in administering the grant, dissatisfaction and litigation among the citizens of the State, and appeals to the Legislature for relief and damages, and states: "A second consideration is this: our predecessors in office, both on the part of the State and the United States, in view of all the facts ex-

isting at the time, concluded that the method of adjustment adopted was the most just and fair, and dictated by the best interests of Wisconsin. As I view the matter, they stood in just the same relation to the subject as we do; and I should hesitate to adopt any other plan than the one entered upon by them, even if my opinion did not agree with that which they entertained. What rendered their action peculiarly appropriate was the consideration of the fact, that the best knowledge which Congress possessed in 1850, of the swamp and overflowed lands unfit for cultivation surveyed and then remaining unsold, may be presumed to have been derived from those official records, the field notes of survey; and the tracts thereby shown to be unfit for cultivation at that time, may be regarded as those which, especially, Congress intended to grant. * * * As it thus appears that the plan of administering the swamp grant in Wisconsin was fully indorsed by the State officers at its inception as just and beneficial; as no serious complaint has arisen during a period of nearly nine years, and as its present and future operation are not the subject of any complaint, I think we have a very strong case against a change. It may be regarded as a matter of congratulation that the plan which was adopted has worked so well, and with such concurrent satisfaction to the officers of the State and the United States, thus indicating its wisdom and fairness, and exhibiting a history so creditable to its merits that we could not hope to make a change for the better by the substitution of any other."

On November 21, 1885, 4 L. Dec., 525, Commissioner Sparks, in a letter addressed to Hon. Van H. Manning, said: "The rule enforced from the beginning has been that a State having elected to take swamp lands by field notes and plats of survey, is bound by them, as is also the government." That decision was affirmed by the Secretary of the Interior on May 12, 1886.

For a period of thirty-five years from the passage of the

act, the rules had been uniform. But in 1886 a qualification was engrafted upon this principle by Secretary Lamar, upon what reason or upon what ground it is difficult to perceive, that while such field notes were binding and conclusive as against the State, they were not as against the United States.

On August 25, 1888, Secretary Vilas, in his decision with reference to the "middle ground," which contention arose in Michigan, used this language: "A special agreement has been made with Michigan, as with some other States, whereby the field notes of the government survey are to be conclusively taken as the basis of determination of swamp and overflowed land in that State, and of the adjustment under the grant." (7 L. Dec., 256.)

Secretary Vilas applied the rule again on August 20, 1888, (7 L. Dec. 243), under the indemnity act of March 2, 1855, in which he ruled against the claim of the State of Michigan, on the ground that the basis of adjustment of the swamp land grant (citing 1 Lester, 542), are the field notes of survey, and that those showed that the lands claimed for indemnity were not swamp lands within the true intent and meaning of the act.

Secretary Noble, on the 20th of September, 1889 (9 L. Dec., 386), passing upon a claim made by the State of Wisconsin, said with reference to this rule to ascertain what legal subdivisions are swamp from the field notes: "When the field notes are the basis, and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines, and all legal subdivisions, the greater part of which are shown by those lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the government."

Assistant Secretary Chandler, on August 5, 1891, (13 L. Dec., 129-130) said: "The department has repeatedly held that where a tract of land has been returned as swamp by the

Surveyor-General, the question of the character of the land cannot be raised, as under the law the land inures to the State. * * * The representation of the lands as swamp, and overflowed on the approved township plat, would be conclusive as against the United States that they were such lands if they had not been patented before the return of the township plat to the Land Office."

In a letter from the Acting Secretary of the Interior, in response to Senate resolution of February 28, 1887, relative to the authority for patenting swamp lands to the State, 50th Congress, first session, printed as executive document No. 55, the Acting Secretary inclosed a report made to him from the Commissioner of the General Land Office containing the information asked for. Upon page 9 of this document, it is stated: "A State having elected to take swamp lands by field notes and plats of survey, is bound by them, as is also the government. See Secretary's decisions: October 4, 1855 (1 Lester's Land Laws, 533); August 1, 1859 (*id.*, 571); December 4, 1877 (4 Copp's L. O., 149); and September 19, 1879."

This court has recognized the use of the field notes as a proper basis of determining the character of the land, both as to the swamp land grant and other grants.

> Martin vs. Marks, 97 U. S., 345.
> United States vs. Louisiana, 123 U. S., 32, at 37.
> Morton vs. Nebraska, 21 Wall., 660, at 674.
> Wright vs. Roseberry, 121 U. S., 502, 503.

## II.

THE TITLE OF THE STATE TO THE LAND GRANTED BY THE ACT OF SEPTEMBER 28, 1850, BECAME PERFECTED BY THE IDENTIFICATION BY THE SECRETARY OF THE INTERIOR IN APPROVING THE LIST IONIA NUMBER ONE, AND MAKING THE PLAT OF THE LAND EMBRACED IN SAID LIST AND TRANSMITTING THE SAME TO THE GOVERNOR OF MICHIGAN.

This was final action, and closed the proceedings so far as it concerned the Department of the Interior as fully as if a patent had actually issued for the several parcels of land.

United States vs. Arredondo, 6 Pet, 729, 730.
United States vs. Throckmorton, 98 U. S. 61.
Vance vs. Burbank, 101 U. S., 519.
United States vs. Land Company, 148 U. S., 43.
French vs. Fyan, 93 U. S. 171.
Tubbs vs. Wilhoit, 138 U. S. 146.
United States vs. Schurz, 102 U. S., 401, 402.
Butterworth vs. Hoe, 112 U. S. 68.
Fore vs. Williams, 35 Miss., 533 (1858.)
Busch vs. Donohue, 31 Mich., 481 (1875.)
Masterson vs. Marshall, 65 Mo., 94-99 (1877.)
Bristol vs. Carroll County, 95 Ill., 84, 85 (1880.)
Hendry vs. Willis, 33 Ark. 833-837 (1878.)

THE ISSUING OF THE PATENT ON REQUEST OF THE GOVERNOR WAS MERELY MINISTERIAL, AND ADDED NOTHING TO THE TITLE ALREADY VESTED IN THE STATE.

United States vs. Stone, 2 Wall, 535.
United States vs. Schurz, 102 U. S, 401-2.
Butterworth vs. Hoe, 112 U. S. 68.

The historic sequence of events should be considered. Township 18 north, range 3 west, was originally surveyed in the first quarter of the year 1839, by Henry Nicholson, under a contract dated July 28, 1838. This township was not among the eighty townships which the State of Michigan had requested to be resurveyed. Mr. Burt reported this survey as "bad throughout," in his report to the Surveyor-General, (Record page 95,) who reported it to the Commissioner of the General Land Office, under date of November 5, 1849. Suit was commenced November 12, 1849, against Nicholson and his bondsmen for not surveying this township, among others, in accordance with his contract and the law, which terminated

in favor of Nicholson, November 25, 1850 (Record 259-264.) September 28, 1850, the grant of swamp land was made by Congress. That act devolved the duty of identifying the land granted upon the Secretary of the Interior, as already shown. The act contemplated that the lands were then, or should be, surveyed by the United States, for it refers to the legal subdivisions. In Michigan there had been surveyed up to September 30, 1850, 30,629,076 acres, leaving unsurveyed at that date 5,366,444 acres (Report of Commissioner, General Land Office, 1850, (Record, p. 100.) The State having acted on the offer of the Secretary of the Interior contained in the circular of November 21, 1850, and adopted the field notes as the basis of identification, the Surveyor-General, under instructions of November 21, 1850, proceeded to make out lists of the lands, which would pass to the State of Michigan under the grant from the plats of the surveys of the several townships, designating thereon the legal subdivisions by the letter "S" (see plat Record p. 46.) Among other lists reported by him to the General Land Office was that known as the Surveyor-General's List No. 1, in the Grand River land district. This list embraced with other lands, the lands which were at the General Land Office, put into a list called Approved List Ionia, No. 1. The latter list so prepared at Washington, was submitted to the Secretary of the Interior, and by him approved on the 27th day of October, 1853, and the plat thereof was made in the Land Department at Washington, duly certified by the Commissioner of the General Land Office. The list so approved and the plat were transmitted to the Governor of the State of Michigan on the 13th day of January, 1854, and 13th day of March, 1854, respectively. On the 31st day of January, 1854, the Governor acknowledged the receipt of the list and requested patents to be issued to the State of Michigan therefor (see Exhibits 15 and 16 p. 26. Exhibit 112 p. 159. Exhibit 29 p. 37). Everything which affected the character of the lands as being

included within the terms of the grant or not, whether as to their character as being swamp or otherwise, or whether the surveys thereof had been fraudulent, defective or erroneous, were necessarily before the Secretary of the Interior when he passed upon the question as to whether or not these lands, so approved by him, were the lands granted by Congress under the act aforesaid.

The questions which the Secretary of the Interior must necessarily have acted upon when the list was presented for his approval were: (1.) Is the land embraced in the list of the character described in the grant? (2.) Has it been established by the evidence on file in the land department that the surveys of the townships included in the list are fraudulent, or so defective, as to cause the Secretary either to reject the list in whole or in part or to suspend action upon it? (3.) Did the land included in the list remain unsold at the date of the passage of the act?

The character of the surveys had been chalenged as fraudulent, erroneous and defective. The report of the Surveyor-General (Exhibits 73 and 74.) pp. 88. 96, dated July 10, 1849, inclosing therein the report of William A. Burt (page 95); the letter of Moses Kelly, of date February 14, 1851, a clerk in the General Land Office, Exhibit 75 (page 96); the report of the Commissioner of the General Land Office for the year of 1850, made to the Secretary of the Interior, Exhibit 76 (page 100); report of the Surveyor-General, of date March 5, 1851, Exhibit 77 (page 103); the report of the Commissioner of the General Land Office for the year 1851, Exhibit 78 (page 105); the letter of the Surveyor-General to the Commissioner of the General Land Office, dated February 10, 1852, Exhibit 79 (page 107); the report of A. S. Wadsworth, Deputy Surveyor, to the Surveyor-General, of date December 24, 1851 (page 110); the letter of the Commissioner of the General Land Office to the Surveyor-General, dated March 8, 1852, Exhibit 80 (page 112);

the report of the Commissioner of the General Land Office and Surveyor-General for the year 1852, Exhibit 81 (page 113); various appropriations made by Congress for resurveys in several States of the Union, including Michigan—all these allegations and the testimony concerning them, was before the Secretary of the Interior when he had before him the list Ionia No. 1, and was called upon to approve, reject, or suspend such list, or any portion thereof, as he should determine. He approved the list, thus identifying the land that passed, so far as such list was concerned, to the State of Michigan. The plat thereof completed the evidence of identification, and both were, as before stated, transmitted to the Governor. Upon such approval, the questions of fraud and error were at once and forever settled. The whole question was passed upon, and closed. It cannot be successfully asserted that the approval of the Secretary of the Interior was obtained or induced by the fraud of any person acting for or representing the State of Michigan, nor, indeed, by the fraud of any person representing the United States or its land department. Whatever of fraud was either charged or asserted to exist with reference to the surveys of the township in question, was then within the knowledge of the Secretary of the Interior at the time of the approval, and such approval was a negation as to the existence, in fact, of such fraud or error, or, at least, it was not of sufficient importance to affect the character of the lands embraced in the list under the agreement with the State of Michigan with reference to the mode of selection. The resurveys, under the claim of fraud in the old surveys, were not a new thing in the Land Department at Washington. Eighty townships had already been resurveyed at the request of the State of Michigan, and the land department had at that time had the opportunity of comparing the two surveys and judging of the extent of such claims of fraud or error. No other claims or charges of fraud have ever been alleged since the approval that did not exist at that time, and

were at that time on file in the department and embodied in letters and reports of the Surveyor-General to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. He was fully advised, and when he determined by his approval that the list called Ionia No. 1 was the particular land which passed to the State of Michigan under the act of September 28, 1850, he passed upon and concluded all questions of fraud in the original survey, from which the Surveyor-General's list had been prepared, so far as the lands listed by the Surveyor-General were included within such approved list.

It is stated in French vs. Fyan, 93 U. S. 169, after referring to the second section of the act (page 171), "We are of the opinion that this section devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling."

The second section of the act provides, "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas, and at the request of said Governor cause a patent to be issued to the State therefor."

It is clear that there are two sets of acts to be performed by the Secretary: First, he is to make out a list and plats of the lands; second, he is to *cause* patents to issue. The question therefore presented is, which of these actions constitute the identification, or are both acts parts of the same process? Which of the duties pertain or belong solely to his duty as *a special tribunal?*

The two acts are of an entirely different character. The preparation of the lists and plats involves the use of discretion,

deliberation and judgment by the Secretary, an exercise of judicial functions. The rules under which this duty is performed are set forth in the third section of the act, which prescribed that, "all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included in said list and plats."

The distinctive character of the second duty is not disclosed by the act of 1850, the only instruction on the subject is that the Secretary shall *cause* patents to issue. Cause patents to be issued by whom? Cause patents to be issued in what manner? Was any coercive authority by this phrase granted to the Secretary? Was the Secretary granted power to issue the patent himself? None of these questions are answered by the statute. Had it been the intention of Congress to grant any special authority to the Secretary in this particular, it would have been expressly stated in the act: not being so stated, on familiar principles, we must conclude that the Secretary was not given any authority to coerce another department or to issue the patent himself, and must look elsewhere for a definition of his duty.

When this act was passed, there existed on the statute books, provisions under which patents were issued for lands sold or granted by the United States. These are found in the revised statutes, substantially as they stood in 1850, and are as follows:

Section 450 provides that the President may appoint a Secretary, "whose duty it shall be, under the direction of the president, to sign his name, and for him, all patents, for *land sold or granted* under the authority of the United States."

Section 453 provides that the Commissioner of the General Land Office should perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the survey, etc., of the public lands, "and the issuing of patents for *all grants of land* under the authority of the government."

Section 454 intrusted the custody of the seal to the Commissioner of the General Land Office.

Section 458 provides that "all patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President and countersigned by the Recorder of the General Land Office, and shall be recorded in the office in books to be kept for that purpose."

Section 459 makes it the duty of the Recorder, under instructions of the Commissioner, to affix the seal of the office to patents for public lands, and to attend to the recording and transmission of the same.

It is manifest that the word *cause*, which defines the duty of the Secretary as to the issue of patents, simply means that the patents provided for were to issue in the usual manner, that is, under the statutes above stated.

It is also manifest that as to this duty, the Secretary was not given any new authority in the premises, nor did his acts involve any act of discretion, deliberation or judgment by him. The procedure, so far as his office was concerned, was purely ministerial, that is the manual preparation of the patent, the affixing of the seal, and the recording of the instrument in the records of the General Land Office.

Stoddard vs. Chambers, 2 How., 284, 318.
United States vs. Stone, 2 Wall., 525, 535.

The execution of the patent was a duty of the President and not the Secretary. The purpose of affixing the seal, and the signature by the Recorder, was for verification of the instrument. We hardly speak of a body or person being a tribunal unless it has some authority to exercise its own discretion, deliberate upon the matter, and then render its judgment; and so far as issuing the patent is concerned, all of these elements are wanting.

The patent under the United States laws, always presumes a previous determination of the right to it, and this is true

whatever be the purpose of the patent; it may, or may not be, the sole record or evidence of the judgment or determination previously made.

Under the congressional legislation, a patent has a double purpose. It may be a conveyance of title, or it may be merely evidence of a title already passed. In the present instance, the title had already passed by virtue of the act itself, and the sole purpose of the patent issued was as a mere evidence of that title. This dual nature of a patent has been frequently recognized by the supreme court.

In *Langdeau vs. Hanes*, 21 Wall 521, the title of certain French and Canadian inhabitants had been confirmed under acts of Congress of 1804 and 1807, which acts provided for the issue of a patent under this confirmation, and the patent was not, in fact, issued until 1872. On page 529 Justice Field stated, "In the legislation of Congress, a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. * * * In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation by the United States. * * * But it would have added nothing to the force of the confirmation."

In *Morrow vs. Whitney*, 95 U. S. 551, a similar case was presented; at page 555, it was said, "In this case the patent would have been of great value to the claimant. It would have enabled him without other proof, to maintain his title in the tribunals of the country. * * * It would thus have proved to its possessor an instrument of quiet and security,

but it would not have added anything to the interest vested by the confirmation."

A case more nearly analagous is that of the *Railroad Company vs. Price County*, 133 U. S. 496. This was a railroad grant in the State of Wisconsin, under which a title passed by virtue of the act itself, it being a grant *in presenti* the same as the swamp grant; the act also provided for the issue of a patent to the railroad company, as it completed successive sections of the road for the land co-terminus with the sections thus completed. After showing that when the route of the road was definitely fixed, the sections of the lands granted became susceptible of indentification, and the title attached thereto, the court held at page 510, "It had then, to the eleven forty-acre parcels which were capable of identification an indefeasible right or title; it matters not which term we used. The subsequent issue of a patent by the United States was not essential to the right of the company to those parcels, although, in many respects, they would have been of great service to it. They would have served to identify the lands as co-terminus with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantees' right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been, in these respects, deeds of further assurance of the patentees title, and, therefore, a source of quiet and peace to it in its possessions."

Even where the patent operates as a conveyance, the title may attach by the previous decision or determination of the person or body having the authority, which cannot be defeated by the mere withholding of the patent by the officers of the General Land Office nor by any attempt to pass the title to

someone else. And this right, resting as it does on this prior decision or determination, will be protected and enforced by the courts. This has long been recognized.

In *Lytle vs. Arkansas*, 9 How. 314, the right of the pre-emption claimant over a subsequent grant to the State of Arkansas was in controversy. The pre-emptioner had complied with the law under which his entry was made, so far as it lay in his power to do so, and the court held, page 333, "The register and receiver were constituted by the act of a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given, If, therefore, they acted within their powers as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final. * * * It is a well established principle, that where an indivdual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

In *Stark vs. Starrs*, 6 Wall. 402, Stark claimed under the "donation act," while the Starrs claimed under the "town site act," which did not become operative in Oregon until after the donation act. The court held, "Before the passage of this act (the act making the town site laws applicable to Oregon), the claim of the defendant Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to the patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to the patent once vested is treated by the government, when dealing with public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

In *Witherspoon vs. Duncan*, 4 Wall. 210, the question arose as to the right of the purchaser, who held merely his certificate issued by the receiver of the local office, and had no patent, and it was held, page 218, "The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the lands ceased to be a part of the public domain. The government agrees to make proper conveyances as soon as it can, and in the meantime holds the naked legal title in trust for the purchaser who has the equitable title."

In *Cornelius vs. Kessel*, 128 U. S. 456, the power of the Commissioner of the General Land Office to cancel an entry and issue a patent to another was involved, and after examining the powers of the Commissioner, and his right of supervision, it was held, page 461, "but the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry upon false testimony, or without authority of law, it cannot be exercised so as to deprive any person of land lawfully entered and paid for? By such entry and payment the purchaser secures a vested interest in the property, and a right to the patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of an other lawfully acquired property. And attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

Again, on page 463, referring to the order of the Commissioner in the case, it was held, "That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent re-instatement of the entry by the Commissioner."

As bearing on the same subject, the following are in point:

Meyers vs Croft, 13 Wall 291.
Wirth vs. Branson, 98 U. S. 118-121.
U. S. vs. Hughes, How. 552.
Carrol vs. Safford, 3 How. 441-460.
Deffebeck vs Hawke, 115 U. S. 392-405.
Simmons vs. Wagner, 101 U. S. 260.

The same distinction was applied in a case of a patent for an invention.

*Butterworth vs. Hoe*, 112 U. S. 50, this was an application for a mandamus to compel the Commissioner of Patents to issue a patent and it was held, page 68, "Some question is made as to the remedy. We think however, that mandamus will lie, and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to the patent. The duty to prepare it, to lay it before the Secretary for his signature, and to countersign it, were all that remained, and they were all purely ministerial."

It is manifest, therefore, that this duty to *cause* a patent to issue is purely ministerial in its character and can only take place when the identification, the act requiring deliberation and judgment has first been had. The duty, therefore, which was conferred upon the Secretary and in relation to which he was a special tribunal, was the making up the lists and plats of the lands described by the act, applying the rule as it is given in the third section of the act. What was the final act of that tribunal, which was the authority for the exercise of the ministerial duty of issuing the patent?

The act itself lays down the rule. The last act which required any act of discretion, deliberation or judgment, was when he attached his signature of approval to the lists and to the plats. Up to that time he is presumed to have deliberated upon the questions involved in a determination of the character of the parcels presented to him: to have heard the evidences: to have examined it: to have applied the rule given in the third section of the act of 1850, and he announced his judgment by attaching his signature to the certificate of approval.

The situation is in all substantial respects analogous to that set forth in *Marbury vs. Madison*, 1 Cranch, 137. The distinction between the act of appointment, which involved

the exercise of discretion and deliberation, and the issuing of a commission, which was ministerial, is discussed at some length by Chief Justice Marshall, and after determining that there is a clear distinction, he says, page 156, "It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to the commission or enable him to perform the duties without it." After some discussion, the chief justice proceeds, "Should the commission, instead of being an evidence of appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or at furthest, when the commission was complete. The last act to be done by the president is the signature of the commission. he has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. Some point of time must be taken when the power of the executive over an officer not removable at his will must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. The last act is the signature of the commission."

The chief justice proceeding demonstrates the ministerial character of the duty of the Secretary of State, which is exactly the duty of the Secretary of the Interior in this case.

namely, to affix the seal and record the document, and makes a very apt illustration, by reference to the issue of a patent under certain of the land laws. He said, page 165, "By the act passed in 1796, authorizing the sale of the lands above the mouth of the Kentucky River the purchaser, on paying his purchase money, becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State, and recorded in his office. If the Secretary of State should choose to withhold this patent or the patent being lost, should refuse a copy of it, can it be imagined that the law furnished to the injured person no remedy? It is not believed that any person whatever would attempt to maintain such a proposition."

Another case analogous in its facts as to the character of the duties to be performed, is that of *Butterworth vs. Hoe*, 112, U. S. 50, 68, an extract from which is given above.

Whenever the question has been presented to the courts the view of the matter expressed above has uniformly been upheld.

In *Wright vs. Roseberry*, 121, U. S. 488, at page 500, Justice Field used this language, "It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whosoever such identification was required to be made. When identified the title would become perfect as of the date of the Act. *The patent would be evidence of such identification, and declaratory of the title conveyed.*

Similar language used in Busche vs. Donohue, 31, Mich., ~~487~~ 448/

"In other words, that the grant to the State made in *presenti* by the act of 1850, had been made definite and certain in

its application to particular parcels granted, by the lists which described and pointed them out. A subsequent patent might be convenient as an evidence of title, but it could not be necessary for the act itself, when the lands were properly identified, was as effectual to transfer the title as any instrument it was in the power of the government to give."

The same views have been announced by the highest courts of several of the States receiving swamp lands, where the question has arisen.

*Hemstead vs. Underhill*, 20 Ark. 337 at 346. "The practice under the act of Congress has been for a State to select such lands as were supposed to be within the grant, and when the lists of lands selected by her officers, and returned to the General Land Office of the United States, were approved by the Secretary of the Interior, the lands selected were said to be confirmed to the State. Such was the process of ascertaining what particular lands were embraced by the grant, carried on by the mutual consent of the two governments. "In *Hendry vs. Willis*, 33 Ark. 833, the question as to the effect of a list approved by the Secretary of the Interior was squarely raised. The plaintiff relied for the evidence that his land was swamp land, upon a list which has been approved by the Secretary of the Interior. The court said: "When these lists, so approved, have been transmitted to the Governor, they have been treated in our legislative and official acts as confirmed, and so we must understand the word." Page 836. "It follows also, from the authority given to the Secretary of the Interior under the act, that after confirmation of the lands by him to the State, the character of the lands, as swamp and overflowed, would be conclusively fixed as against the United States, or any one holding under it by patent after confirmation."

*Masterson vs. Marshall*, 65 Mo. 94, the plaintiff claimed title by virtue of a pre-emption location made at the United States Land Office, in 1856, and the defendant claimed title

under the county of Carroll: this title being deduced from the State as swamp lands, the lands having been listed and approved by the Secretary in 1854, but a patent was not issued until 1858, or about two years after the location made at the United States Land Office. It is said: "That where in any given case the particular tracts constitute a portion of the subject matter of the grant contemplated by the act of 1850, has been authoritatively ascertained, the grant at once takes effect as to the portion so designated and the title thereto vests in the State without a patent. * * * Lists of such lands selected by State authority, when approved by the Secretary of the Interior and reported to and accepted by the Governor, are clearly sufficient to complete the grant and vest the title. Such lists were made in the present case, and the title to the lands in controversy was therefore vested in the present case, and the title to the lands in controversy was therefore vested in the State at the time of the location and settlement made by the plaintiff in 1856, although no patent had then issued to the State."

*Fore vs. Williams*, 35 Miss. page 533, after determining that no patent was necessary to convey the land to the State, the question presented was whether the land in controversy had been sufficiently located to make it the subject of the grant to the State. The plaintiff claimed under a patent issued from the United States Land Office. The list of lands had been approved by the Secretary of the Interior, but it did not appear that they had been forwarded to the Governor, but lists approved had been previously approved by the Governor, and the Secretary of the Interior returned them to the local land office where they had been on file, and were there at the time the action was instituted. The court held that, "Under such circumstances, the United States could not be heard to say, that its officer had not performed his duty, according to the form of the Act of Congress, and to found any right upon such ground."

*Daniel vs. Purvis*, 50. Miss. 261. the plaintiff claimed. under a patent issued on a location at the United States Land Office in March. 1859. and defendant claimed the land as swamp lands. and based his title upon an approved list made in December. 1856. The court said. "The designation of a list and plat approved by the Secretary of the Interior was to identify the land. The title passed to the State. by virtue of the grant in the act of 1850; and list and plat served to identify the subject of the grant."

*Bristol vs. Carroll County*. 95 Ill. 84, plaintiff showed his title under the swamp land grant by exhibiting an approved list made by the Secretary of the Interior, and defendant claimed under a patent issued by the United States subsequent to the certification by the Secretary of the Interior. It was held: "It was not necessary. as suggested by appellants. to show that the lands were in fact swamp and overflowed lands. It was enough that they were found included in the list of swamp and overflowed lands which the Commissioner of the General Land Office transmitted to the Governor as such. The Act of Congress conferred upon the Secretary of the Interior. the power of determining what lands were of the description granted by that act. and the decision of his office on that subject is controlling. French vs. Fyan. 93 U. S. 169."

There have been a number of opinions by the Officers of the Land Department in relation to this matter. which are strictly in line with the authorities above cited.

1, Lester's Land Laws, 554. 557. 562. 564 and 570.

The case of *Barden vs. Northern Pacific Railroad Company*. 154 U. S.. 288. is not in conflict with the views above expressed. This was a grant *in presenti* to the railroad company of "every alternate section of public lands not mineral. designated by odd numbers. to the amount of twenty alternate sections per mile on each side of said railroad line." The fourth section provided that upon the completion of sec-

tions of the road of 25 miles each the same were to be examined by three Commissioners, to be appointed by the President, and if they reported the road completed in accordance with the act, "patents of lands as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and co-terminus with said completed section of said road." The lands in controversy were within the forty-mile or "place" limits of the line of road as located. There was no provision for the listing of the lands, but the railroad company had caused a list to be prepared which included the lands in question, and filed it with the District Land Office in Montana, and the same was approved by the Register and Receiver and forwarded to the Commissioner of the Land Office in 1868, and had ever since remained there. In 1888, veins of gold and silver were discovered under property which were located by Barden and others, who went into possession, and the action is brought by the railroad company to recover possession of the property. Justice Field renders the opinion and on page 313, calls attention to the effect of a definite location of the road, "the ascertainment of the location of the sections in no respect affected the nature of the lands or the conditions on which their grant was made. If swamp lands, timber lands or mineral lands, previously, they continue so afterwards."

"It is also true that the grant was one *in presenti* of lands to be afterwards located * * * But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed." The railroad company contended, that, notwithstanding this exception of mineral lands, it meant only such mineral lands as were then known to be mineral, but the opinion points out that there is a distinction in the act between mineral lands and several of the other classes of lands which were excepted. (page 316). "There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant.

Mineral lands were not conveyed, but, by the grant itself and the subsequent resolution of Congress cited, were specifically reserved to the United States, and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located, they could not pass under the grant."

Some comment is then made on the conclusive nature of the patent when issued, and then the opinion states (page 318), "But grants in aid of railroads (*and we speak of no other grants*) before such determination and issue of a patent, have never been held to pass other minerals than iron or coal, and it is only with other minerals, and lands containing them, that we are concerned in this case." It is then demonstrated that there was a necessity surrounding the grant that the Land Department should have time for examination of the lands as to their character, as being mineral or non-mineral, owing to a lack of survey, and many other facts which are there discussed, and proceeding: (page 321), "The Act of Congress does not provide that selections of the lands by the plaintiff, as a part of its grant, shall in any respect change its purport and effect and eliminate any of its reservations; nor does it empower the officers of the local land office to accept the list as conclusive with respect to such grant in any particular."

The opinion then points out that the last act indicating this identification of the lands as non-mineral in passing upon the grant, and in fact the only evidence of such act of identification provided for by the act making the grant was the issue of the patent and reaches the conclusion that under the grant in question (page 330), "The fact remains that under the law the duty of determining the character of the lands granted by Congress and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued defining the character of the land granted, and showing that it is non-mineral, it will not comply with the Act of Congress in which the grant before us was made to the plaintiff."

In the swamp land act, a distinct act of identification was provided for, and evidence of such act was to be issued by the department, and transmitted to the Governors of the several States, before any patent was to issue, so that so far as the judgment of the department on the subject matter was concerned, the patent was but cumulative evidence of what had already been evidenced by the lists and plats.

The cases of *Chandler vs. Calumet & Hecla Mining Co., 149 U. S. 79; McCormick vs. Hayes 159 U. S. 332, and Locomotive Co. vs. Emigrant Co., 163 U. S.* — are not analogous. In each of these cases the claimant under the swamp grant sought to attack a patent solely by proof of the actual character of the land, no lists or plats had been made certifying the lands to the States of swamp lands. It also appeared that the State had in each instance taken the lands under other grants in which the Land Department had acted.

It is true that in the cases of *McCormick vs. Hayes* and *Locomotive Co. vs. Emigrant Co.*, some emphasis seems to be laid on the words "on that patent the fee simple to said lands shall vest in said State," etc. It is submitted, however, that the argument in both opinions, supports the contention here made that the act of identification was complete by the approval of the lists and maps, and as to the facts thus determined, the Secretary of the Interior was *functus officio*. Quoting from the opinion in the latter case, "*When he made such identification*, then, and not *before, the State* was entitled to a patent," etc.

When identified they became severed from the public domain, a vested interest had passed, the extent and character of that interest to be evidenced by the patent, which the State by the *act* of identification was in situation to demand.

The same doctrine has been recognized and acted upon by the authorities of the Land Department at Washington. January 4, 1856, Secretary McClelland instructed the Commissioner of the General Land Office with reference to selections

made in the State of Louisiana under the act of March 2, 1849. "The approval of the list directed to be prepared under the act of 1849, exhausted the power of the Secretary of the Interior over the subject-matter, and he can no more, of his own motion, revoke or cancel any part of an approved list under that act, after it has passed from him, than a patent for land after its delivery." (1 Lester's Land Laws, 554.)

Secretary Thompson to the Commissioner of the General Land Office, December 29, 1857 (1 Lester's Land Laws, 557, with reference to swamp lands in the State of Missouri, says: "In my opinion the approval and certificatiion of my predecessor, are the completion of a duty in regard to swamp and overflowed lands, imposed on the Secretary of the Interior by said act of September 28, 1850, and his act cannot now properly be reviewed or recalled. The State authorities have a right to call for a patent or patents pursuant to certified lists unless fraud or mistake has been discovered.

And again, the same Secretary, on October 24, 1858 (1 Lester's Land Laws, 562), said: "I am of the opinion that the question of the swampy character of such tracts as have been carried into approved lists, and certified to the Governor of the State as such, has already been determined affirmatively, so far as the action of this department is concerned, and contests on that point can no longer be properly entertained. * * * When selections under the act of September 28, 1850, have been approved and certified, the duty of designating the granted lands imposed by the law on this department, has been discharged, the acts done cannot be recalled or annulled, and the State has a right to demand a patent for the tracts of lands embraced in any certified list that has been delivered to the Governor."

Attorney-General Black gave his opinion to the Secretary of the Interior November 10, 1858 (1 Lester's Land Laws, 564), in which he stated: "It is not necessary that the patent should issue before the title vests in the State under the act of

1850. The Act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect; and to attain that object, the Secretary of the Interior was directed to make out an accurate list and plat of the lands, and cause a patent to be issued therefor. But when a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title. The authority given to the State Legislature to dispose of the lands upon the patent does not make the grantee less the exclusive owner of them than she would be if those words were omitted."

Secretary Thompson, in a communication to the Commissioner, dated July 22, 1859 (1 Lester's Land Laws, 570,) used the following language: "Sir—In returning the papers which were submitted, by request of Hugh Short, Esq., with your letter of the 20th inst., I remark, that when a tract has been selected, and has been approved and certified as a swamp tract, inuring under the act of 2d March, 1849, to the State of Louisiana, the fact of the land being of a swampy description must be regarded by us as affirmatively determined, and not to be drawn in question, or subject to a different adjudication."

And the Land Department continued to act under this construction of the law until 1886, when Secretary Lamar, while approving of the decisions above cited, added an extraordinary qualification to them by asserting that the approved list might be altered and the selections therein annulled until patent was issued.

III.

THE SECRETARY OF THE INTERIOR, HAVING IDENTIFIED THE LANDS AS SWAMP BY MAKING A LIST AND PLAT THEREOF IN COMPLIANCE WITH THE SECOND SECTION OF THE ACT OF SEPTEMBER 28, 1850, WAS WITHOUT POWER TO ANNUL, CANCEL OR REVOKE SUCH DESIGNATION, NOR COULD HIS SUCCESSOR

ANNUL, CANCEL OR REVOKE HIS DESIGNATION, AND THUS WITHDRAW THE LANDS FROM THE OPERATION OF THE GRANT.

Under the principles laid down in the foregoing discussion, the State became the legal owner of the lands in controversy under the act of identification.

On the part of the defendants, it is contended that this identification, this judgment of the Secretary of the Interior evidenced by the lists and plats forwarded to the State of Michigan, was erroneous inasmuch as it was founded upon evidence which they allege was fraudulent, and did not show the true state of the facts as to the character of the lands, and that therefore, the Secretary of the Interior was imposed upon, mistaken and erroneous in his conclusion, and that it was competent for him, on this fact appearing, to revoke his former decision as evidenced by his certificates of approval, and to cancel or revoke the lists in whole or in part, on the principle that the proceedings were vitiated by the fraud alleged to have been perpetrated.

The documents and other matters upon which these allegations seem to be based have already been referred to (see p. 70 *et seq.*) and then pointed out how these with other matters must necessarily have been before the Secretary of the Interior when he examined and finally approved the list Ionia No. 1, and requested the Governor to call for patent.

To this we add as a fact which may have had some influence upon his decision.

Prior to the time of the resurvey of the township by Cannon, in 1856, land in this township had been sold by the United States government upon twenty-two of the thirty-six sections, amounting in the aggregate to over 31,000 acres. These sales were made by the old plat and survey, which had been recognized as the official government plat for seventeen years at the time of such resurvey. In order to show more fully the extent to which the General Land Office had recognized

the survey of 1839, prior to 1858, plaintiff in error sought to show by its witness, Oscar Palmer, that prior to 1853 and between 1850 and 1853, the General Government had through its Land Department sold lands in nearly every section of the town, and particularly had sold lands in the sections involved in this controversy, and thus had recognized this survey, and it had been in actual use by the Government from 1839 up to March 3, 1857. This testimony the court decline to admit. In view of the facts already presented and what will follow, we submit that the testimony was material and relevant to the issue, and should have been admitted.

Tubbs vs. Wilhoit, 138 U. S. 134, 146.

No charge is made of any fraud on the part of the State of Michigan, or that the State in any manner induced or obtained the approval. The State had no duty to perform, it was the duty of the Secretary to proceed without any request.

U. S. vs. Louisiana, 123 U. S. 32, 37.

Moreover, the State, by virtue of the act of June 28, 1851, had done the only thing she could do in the premises.

We must therefore consider the judgment of the Secretary as a negation of the charge of fraud or error, or at least, that in his mind it was not of sufficient importance to affect the character of the land embraced in the list, or effect the arrangement which had been entered into as to the basis of making such a selection.

The conclusive nature of such a judgment upon the facts by the Secretary as a special tribunal is too well settled and determined to need discussion or citation of authority. Many of the cases have already been referred to, and the subject is so fully discussed in *Johnson vs. Towsley*, 13 Wall., 72, and a multitude of other cases, as not to need amplification here.

If we consider the matters referred to as the basis of this charge of fraud, as now renewed by the allegations of defend-

ant's answer in this case, we must presume, and it follows as a necessary result, from the conclusive nature of this decision of the Secretary that the matter had been passed upon by the Secretary in 1853, and settled adversely to the claim of defendants.

Has any new or further evidence been brought forward by the defendants, or was any new or further proof produced to the Secretary upon which the allegations of fraud, mistake or erroneous action can be predicated?

The only matter shown by the record, and it is submitted it is all that can be shown, is that in September, 1856, the town was resurveyed, and the map of survey approved February 12, 1857 (Exhibit 123 p. 174), and under date of May 13, 1858, the Surveyor-General made a new list called Grand River Supplemental No. 3, which included this township, which was received at the General Land Office May 20, 1858. No action was taken upon it by the Secretary of the Interior, however, until 1866 (Exhibits 124 p. 175, 125 p. 177, 126 and 127 p. 178).

In stating some of the facts relative to this, the opinion of the Court of Appeals, (p. 333), in referring to Ionia Approved List No. 1., as having been approved October 27, 1853, and sent to the Governor January 13, 1854, says: "In the margin of the descriptions contained in town 18 north, of range 3 west was written the letter "F" which was explained in the accompanying certificate to mean that the survey of that township had been reported fraudulent." This is a mistake. No such certificate attached to the Ionia list, nor is this town marked "F." Exhibit 111, (p. 153) is from the State Land Office.

The certificate referred to is attached to *Surveyor General's list Grand River No. 1.*, certified by the Surveyor General, March 29, 1852, and sent to the General Land Office, March 31, 1852. (Exhibits 11 and 26 pp. 24 and 36.)

It was this list which the Secretary of the Interior had be-

fore him and from which he made up the approved list Ionia No. 1, and as already pointed out his approval must stand as a negation of the charge of fraud, or at least that it was not of enough importance to affect the question of approval.

It is submitted that the only possible effect of these surveys and the preparation of these lists, was to re-state in a new form the same allegations of fraud that had existed and had been made prior to the approval list (Ionia No. 1, in 1853), and at the most, they cannot be considered as anything more than cumulative on that subject.

Not every allegation of fraud is sufficient to vitiate a judgment of a court or of a special tribunal of this character, nor will it lay the foundation for the courts, by judicial proceedings to set aside the action or finding of the special tribunal.

In *United States vs. Throckmorton*, 98 U. S. 61, a bill in chancery was brought by the United States to have a decree of the circuit court set aside, and declared null and void a confirmation of a claim under a Mexican grant, which had been made by the Board of Commissioners, and affirmed by the court. The general ground was that the decrees were obtained by fraud. Mr. Justice Miller rendered the opinion, and on page 66, stated, "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." The court then cited several cases in support of the point, and quoting from *Green vs. Green*, 2 Gray, 361, says, "the maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible, and the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contra-

dicted." * * * "We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter in which the decree was rendered. The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, or which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." And referring to the proofs in the case under consideration, said, "the genuineness and validity of the concessions from Micholtorena, produced by complainant, was the single question pending before the Board of Commissioners and the district court for four years. It was the thing and the only thing that was controverted, and it was essential to the decree. To overrule the demurrer to this bill, would be to retry, twenty years after the decision of these tribunals, the very matter which they tried on the ground of fraud in the document on which the decree was made."

The remarks of the court are particularly applicable for ths first period at which there is any attempt to set aside or revoke approved list. Ionia No. 1, by the Land Department that can be pointed out by the defendants was fully 13 years after the date of approval, and the revocation is not then express, but rests entirely on inference.

In *Vance vs. Burbank*, 101 U. S. 514, the doctrines above announced were applied to decisions of the Land Department. Chief Justice Waite, at page 519, said, "The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final

to the same extent that those of other judicial or quasi-judicial tribunals are. It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said that there has never been a decision in a real contest about the subject matter of inquiry. False testimony or forged documents are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal (citing cases). The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute."

The principle was early asserted in *United States vs. Arredondo*, 6 Pet., 729, and quoted with approval in *United States vs. Land Company*, 148, U. S. 31, 43. "It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred. The only question which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer and fraud in the party. All other questions are, settled by the decision made, or the act done, by the tribunal or officer; whether executive (1 Cranch, 170-171), legislative (4 Wheat 423; 2 Pet 412; 2 Pet, 563), judicial (11 Mass., 227; 11 S & R. 429; adopted in 2 Pet, 167-168) or special (20 Johns, 739, 740; 2 Dow, P. C., 521, etc.) unless an appeal is provided for, or other revision by some appellate or supervisory tribunal, is prescribed by law."

The result would be the same even if we conceded that a patent was necessary to pass the title. The interest conveyed by the grant, and evidenced by the identification, was such

that the State had obtained a vested right, of which it could not be deprived by any act on the part of the Secretary of the Interior. Such rights can only be divested by a judicial proceeding for that purpose in the courts. The authorities sustaining this point have already been cited, as bearing on a different question, and the quotations there made are fully in point at this place:

Lytle vs. Arkansas, 9 How., 314-333.
Stark vs. Starr, 6 Wall, 402.
Witherspoon vs. Duncan, 4 Wall, 210-218.
Cornelius vs. Kessel, 128, U. S., 456-461-463.
Wirth vs. Branson, 98 U. S. 118, 121.
United States vs. Hughes, 11 How., 552.
Carroll vs. Safford, 3 How., 441, 460.
Deffeback vs. Hawke, 115, U. S. 392,405.

Furthermore, the contention of the defendants overlooks the distinction between acts that are void and those which are simply voidable. The courts in many cases involving the acts of the Land Department, and other tribunals of a *quasi* judicial nature, have had occasion to point this out, stating in substance that where the act of the Secretary was wholly without jurisdiction, as for example, he had undertaken to convey lands the title to which was never in the United States, his act was absolutely void; or where he had conveyed lands the title to which had been theretofore conveyed by the government of the United States, such an act might be held void in a court of law. On the other hand, there are a large class of cases where the Secretary of the Interior had undoubted authority to act in the first instance, but his judgment is claimed to be erroneous by reason of fraud or mistake. In the latter class of cases, it is held that his acts in the premises are merely voidable, and that this discretion, deliberation and judgment, exercised in passing upon the questions presented to him, becomes exhausted by the issuing of the order, list or patent required to be issued, and thereafter he is with-

out jurisdiction over the subject matter. If the effect of the exercise of this discretion or judgment in the matter where he has jurisdiction to act at all, is to confer a vested right, the setting of it aside is a judicial function, requiring the interposition of the courts, inasmuch as an attempt to recall the rights thus vested would be an attempt on the part of the department to deprive parties of their property without due process of law. As seen in the cases cited just above, the party having such vested right may stand upon it, and the courts will afford him protection.

As applied to the acts of the Secretary of the Interior, the whole subject is very ably discussed by Mr. Justice Brown in the case of *Union River Logging Railroad vs. Noble*, 147. U. S., 65.

From the pleadings it appeared that it was alleged that the railroad company was not such as was contemplated by the Act of Congress, being merely a company organized for private purposes and not for the purposes of a common carrier engaging in the transportation of passengers and freight, and that the Secretary had been induced to attach his approval to a certain map by reason of false suggestions as to the character of the business engaged in by the railroad company. After reviewing the authorities and pointing out the distinction between such acts as are void and those that are voidable, the opinion holds: "The railroad company became at once vested with the right of property in these lands, of which they could only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained." *Moffat vs. United States*, 112 U. S. 24; *United States vs. Minor*, 114. U. S. 233. A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attenpt to deprive the plaintiff of its property without due process of law, and

was therefore void. As was said by Mr. Justice Grier in *United States vs. Stone*, 2 Wall. 525-535, "one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and required the judgment of the court."

An earlier case, where the same questions are discussed, is that of *Moore vs. Robbins*, 96 U. S. 530. In this case the question arose on the right of one Moore, who claimed title under a patent which had been issued to him under the following circumstances: Moore had purchased the land at a public sale at the United States Land Office, in November, 1855, but his right to purchase it was contested before the Register and Receiver by one Bunn who claimed to have the rights of a prior pre-emptioner. The Register and Receiver decided in favor of Bunn, and Moore appealed to the Commissioner of the General Land Office, who reversed the decision of the Register and Receiver and issued a patent to Moore. After the issue of the patent, Bunn appealed from the Commissioner of the General Land Office to the Secretary of the Interior, who reversed the decision of the Commissioner and directed the Commissioner to recall the patent to Moore and to issue one to Bunn. Moore refused to return his patent to the land. Mr. Justice Miller delivering the opinion of the court, concedes the Land Department to the fullest extent its right to pass upon the questions involving the issuing of a patent, and on page 533 says, "With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land, who has conveyed it to another, can of his own volition recall, cancel or annual the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy." Speaking a little further on the same page "The functions of that department necessarily cease when the title has passed from the government. * * * It is a matter of course that

after this is done neither the Secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so the titles derived from the United States instead of being safe and assured evidence of ownership as they are generally supposed to be would be always subject to the fluctuating, and, in many cases, unreliable action of the Land Department. If such a power exists, when does it cease? There is no statute of limitations against the government, and if this right to reconsider and to annul a patent after it has once become perfect, exists in the executive department, it can be exercised at any time however remote. It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with universal principal on which the right of private property is founded."

The same questions were again presented in the case of *United States vs. Schurz*, 102 U. S. 378. This case was an application for a mandamus to compel the Secretary of the Interior to deliver a ~~petition~~ patent which had been withheld on the ground that the patent had been improvidently issued, it having been suggested to the department that the lands included in the patent had also been included in a prior application for a town site. After pointing out the distinction between such acts of the department as are merely voidable and those that are absolutely void, Mr. Justice Miller, in delivering the opinion of the court, says, "Here the question is whether this land has been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the Land Officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void. The mode of voiding it, if voidable, is not by arbitrarily withholding it but by

judicial proceedings to set it aside, or correct it, if only partly wrong.

From the very nature of the functions performed by these officers, and by the fact that a transfer of the title from the United States to another owner follows their favorable action, it may result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of government, or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away." (pp. 401-2.)

## IV.

THE TITLE TO THE LANDS IN CONTROVERSY HAVING VESTED IN THE STATE OF MICHIGAN BY THE IDENTIFICATION BY THE SECRETARY OF THE INTERIOR, IT CAN NOT BE DIVESTED BY ANY ACT OF THE SECRETARY OF THE INTERIOR, UNDER HIS AUTHORITY OVER THE PUBLIC SURVEYS AND THE TESTIMONY OFFERED RELATING TO RE-SURVEYS AND THE PROCEEDINGS FOUNDED ON THEM WAS IMMATERIAL AND SHOULD HAVE BEEN REJECTED.

We do not dispute the authority of the Land Department to make resurveys, for it must be conceded as settled beyond all controversy "that the power to make and correct surveys of the public lands belongs to the political department of the government, and that whilst the lands are subject to the supervision of the General Land Office their action is unassailable in the courts."

> Cragin vs. Powell, 128 U. S., 691–699, and the cases there cited.

But it is also equally well settled that this authority is limited whenever the private rights of parties have intervened, based on the survey it is proposed to set aside or in any manner correct, so far as such survey undertakes to interfere with or appropriate those rights. For, "It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself."

Cragin vs. Powell, 128 U. S., 696, 699, 700.

The township in which these lands are located, township 18 north, of range 3 west was surveyed in 1839.

Map of township, Exhibit 31, opposite p. 47.
Certificate to field notes, Exhibit 30, p. 47.

And the lands in this town had been offered for public sale by the President's proclamation June 15, 1840, and from that time until June 3, 1858, at least, the plat was the only recognized plat of survey in that township.

Testimony of Oscar Palmer, pp. 49-50,

and sales had been made by the general government with reference to the plat of the survey of 1839.

Testimony of Palmer p. 52.

Certainly it was in reference to his survey that the Secretary of the Interior acted in approving the lands, and on it the Register of the United States Land Office marked the parcels in controversy in this suit as swamp and passed to the State (p. 49).

The title having vested therefore, and passed with reference to the survey of 1839, we submit it was incompetent for the Secretary to interfere with these rights by ordering a second survey of tne township. There is no pretense that this survey was ordered prior to 1856, the time when the contract was let to Mr. Cannon (p. 125), or nearly three years after the lands had been approved to the State.

*Lindsey vs. Hawes*, 2 Black, 554, was where a survey had been made in 1833, the maps, plats, certificates and field notes of such survey all filed in the proper offices, the survey approved and acted upon by the government for a period of eleven years, and under it the land sold to Lindsey, the government receiving the purchase price and tendering him a patent certificate, and five years thereafter the first suggestion of the necessity for a resurvey is made, and the court holds that so far as the location of the lines of the quarter section entered by Lindsey the government was bound by the original survey. The same doctrine is laid down in the case of *Cragin vs. Powell*, above cited, in which Mr. Justice Lamar, delivering the opinion of the court (p. 699), says: "Nor is it denied that when the Land Department has once made and approved a government survey of public lands (the plats, maps, field notes and certificates, all having been filed in the proper office), and has sold or disposed of such lands, the courts have the power to protect the private rights of a party who has purchased in good faith from the government, against the interference or appropriations of corrective resurveys made by that department subsequent to such disposition or sale." On the same point, see the following cases:

Bates vs. Railroad Company, 1 Black, 204.
Railroad Company vs Schurmeier, 7 Wall, 272-289.

These resurveys have also been before the Supreme Court of the State of Michigan in several cases, and they have in every instance followed the doctrines here stated. Mr. Justice

Sherwood, delivering the opinion of the court in the case of *Baker vs. McArthur*, 54 Mich., 139, states that where the rights of parties have been "fixed and regulated" by the lines of an old survey which have been lost, the old lines are to be ascertained and re-established, and not new ones constructed by a resurvey; and in this case "It appears, however, this was not done, and when it is not the mischief of unsettling boundaries which have been generally accepted and acted upon usually follows, and this is always to a greater or less extent injurious, and will not be looked upon with favor by the courts whose duty it is to protect the rights of the parties interested against the unlawful encroachments of the parties claiming under such resurveys."

This case was followed in that of *Burt vs. Busch*, 82 Mich., 506. In this case, Congress, as late as 1877, sought by a recital of the imperfection of previous surveys, to order a new survey of town 18 north, 1 west, one of the towns, by the way, which was included in the same contract of Mr. Nicholson, under which the town in controversy in this case was surveyed, the survey being completed by Mr. Nicholson in 1839. The opinion states, referring to the Act of Congress of 1877, "Long prior to this act the State of Michigan had made selections of these swamp lands and issued its patents to purchasers, describing the lands according to the government surveys, and selling them in the government subdivisions, having reference to the surveys, maps, and field notes of 1839. The rights of the plaintiff had become vested in accordance with this survey at the time of the issue of the patent. * * * and, as well stated by the plaintiff's counsel, if this Act of Congress of 1877 was permitted to change Mr. Burt's title, the next Congress can pass an act, and say the survey of 1877 was void, and thus purchasers under that survey be divested of rights acquired thereunder" (page 512).

These doctrines were followed again in the later case of *Butler vs. Railroad Company*, 85 Mich., 246.

As to effect of recognition of an imperfect survey or plat see:

U. S. vs. McLaughlin, 30 Fed. Rep. 147, 162.
Tubbs vs. Wilhoit, 138 U. S., 134, 146.

The district judge, seems to have had a different idea of the effect of the ordering of the resurvey, in substance, that it was for all practical purposes a revocation by the Secretary of the Interior of his former approval, and in this the Court of Appeals seems to have concurred. (Opinion p. 340). It would seem to be a sufficient answer to this to say, as we have already at some length pointed out, that if the purpose of ordering a resurvey was to discover or make clear the frauds alleged to have existed in the survey of 1839, it was but a new presentation of the very facts which had been alleged prior to the making of the approval, and which, it must be conclusively presumed, the Secretary passed upon at that time, and by that act disposed of the allegation of fraud. Having passed upon the fact in such a manner that the title of the State had become vested, the matter was no longer within his control. Such an act requires the interposition of the courts.

If the mere ordering of a resurvey is sufficient to work a revocation of an approved list, may it not be done at any period, however remote, and had the Secretary simply withheld patents, he could order such a resurvey today, and next year cause a further resurvey to be made, and thus delay the matter of identification indefinitely.

The cases of *Knight vs. Land Association* 142 U. S. 161, and *New Orleans vs. Paine* 147 U. S. 261, 266, are not in conflict with the views above expressed. In both cases the matter of the surveys were incomplete, and further the rights of third parties had not intervened.

## V.

THE ACT OF CONGRESS OF MARCH 3, 1857, OPERATED TO CONFIRM TO THE STATE OF MICHIGAN THE LANDS IN CONTROVERSY, AS THEY ARE DESCRIBED IN THE LIST KNOWN AS IONIA APPROVED LIST NO. 1.

It is a fact well understood, that the land officers of the United States, continued to make sales of lands claimed by the several States to be swamp and overflowed, within the terms of the grant. From this cause, and the delay of the Secretary of the Interior in making out the lists and plats identifying the lands inuring to the several States under the grant, a great many conflicts and contested claims arose in the department in relation to what land should properly be listed to the several States. Congress endeavored to protect *purchasers* as far as possible, and at the same time indemnify the State so far as relates to the lands which had been *sold* at the United States Land Offices, by its act of March 2, 1855.

10 Statutes at Large, 634.

But the contests seemed to increase in number. Mr. Justice Nelson, commenting upon this in the case of *Railroad Company vs. Fremont County*, 9 Wall., 89, at 92, says: "The second section of the act provided that compensation should be allowed to the States only in respect to subdivisions taken up by the settlers, which were swamp lands within the true intent and meaning of the act of 1850—that is, where the greater part were wet and unfit for cultivation; and the Land Department therefore allowed parties to contest the claims of the States and give evidence before the proper officers that the subdivision was not of the character contemplated by the law. As a consequence, under this construction of the act, controversies increased between the settlers and the States, and, as stated by one of the Commissioners of the Land Office, the contesting applications pending before the department involved by

estimate three millions of acres, and, on investigation being ordered, papers came into the office by bushels. Pending these proceedings, Congress intervened and passed the act of March 3, 1857," which provided, "That the selection of swamp and overflowed lands, granted to the several States by the Act of Congress, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed and shall be approved and patented to the several States."

11 Statutes at Large, 251.

In this case, the State of Iowa, having filed certain lists in the office of the Commissioner of the General Land Office prior to March 3, 1857, they were held to be confirmed to the State as against the railroad company, claiming the same lands under a grant by Congress of May 15, 1856.

The question again arose in the case of *Martin vs. Marks*, 97 U. S., 345. In this case, the Surveyor-General for Louisiana, under date of May 18, 1852, had filed with the Commissioner of the General Land Office a list of swamp lands, "selected as inuring to the State of Louisiana under the provisions of an act of Congress, approved September 28, 1850, excepting such as are rightfully claimed or owned by individuals." The exact date when this was filed does not appear by the record, but no objection being made in the court below, the court presumed that the Surveyor-General did his duty and that the list was forwarded to the General Land Office some time between May, 1852, and March, 3, 1857. Mr. Justice Miller, delivering the opinion of the court, says: "If the paper, signed by the Surveyor-General, dated May 18, 1852, was on file in the General Land Office at Washington, March 3, 1857, we have no doubt that the act completed and made perfect the title of the State of Louisiana to the land in contro-

versy. If this were so, the title of the plaintiff below was superior to the patent issued subsequently to the defendant; for after the passage of that act the land department *had no right to set aside the selections.* The approval of them *and the issue of patents to the State were mere ministerial acts, in regard to which that department had no discretion,* unless it was found that the lands were not vacant, or had been actually settled on adversely to the swamp land claim. The act of 1850 was a present grant, subject to identification of the specific parcels coming within the description; *and the selections confirmed by the act of 1857 furnished this identification, and perfected the title.*"

The district judge in his charge to the jury (p. 209, assignment of error No. 116), apparently adopted the view that the act of 1857 had no application to the State of Michigan. This, it seems to us, is clearly erroneous, inasmuch as such has never been the views of the department in relation to it, and there is nothing in the words of the act from which such an inference can be drawn. The act itself does not refer to the selections made by the States by their own agents, as was done in several of the States, but speaks generally, referring only to the selections, not undertaking to state from what sources they should have been made. Moreover, the act, by express reference, refers to the grant of 1849 of swamp lands to the State of Louisiana, by the very terms of which the selections were to be made and reported by the Surveyor-General. The department has always held that the act of 1857 applied to the selections reported by the Surveyor-General of Michigan, and some of the papers are contained in the Record.

Wilson, Acting Commissioner, to Sanborn, Dep. C. S. L. O., September 23, 1859, Exhibit 183, p. 279.

Drummond, Commissioner, to Clapp, C. S. L. O., February 20, 1874. Exhibit 187, p. 283.

Drummond, Commissioner, to Clapp, C. S. L. O., January 5, 1873, Exhibit 185, p. 282.

Some of defendant's own exhibits clearly show this: Exhibit 154 (p. 217), where an extra certificate is attached, showing that they were certified as lists selected and reported to the office "prior to the date of the confirmatory act 3d March, 1857," that is, lists prepared and forwarded by the Surveyor-General to the Commissioner of the General Land Office under the instructions of November 21, 1850, as already detailed; Exhibit 134, at page 186, contains a similar certificate, showing the lands approved by reason of the act of March 3, 1857.

It was further contended by the defendants that the act had no effect upon lands which had been carried into lists approved by the Secretary of the Interior, and the district judge apparently adopted this view in his charge to the jury above noted. The weight of opinion from the department and its practice was in fact contrary to this view. In a decision of Secretary Thompson, December 29, 1857 (Lester's Land Laws, Vol. I, p. 557), he states: "In my opinion, the approval and certification of my predecessor are the completion of a duty in regard to swamp and overflowed lands, imposed on the Secretary of the Interior by said act of September 28, 1850, and his act cannot now properly be reviewed or recalled. * * * The practice of the department of late years has not been in accordance with those views, but the confirmatory act of 3d March 1857, introduces a change of policy and indicates to me a principle of action in such cases, which I do not hesitate to adopt." In the letter of Acting Commissioner Wilson to Sanborn, Dep. C. S. L. O., of September 23, 1859, above cited, he makes application of the act of March 3, 1857, to lands which had been *patented* to the State prior to that date in the Ionia land district. Drummond, Commissioner, to Clapp, C. S. L. O., under date of February 20, 1874 (cited above), applies the act of March 3, 1857, to lands which were contained in an *approved* list for the Detroit district, approved June 25, 1853, but not carried into patent.

Secretary Teller, November 22, 1883, 2 L. D. Dec., 652, reviews the whole question, and there decides in reference to the State of Louisiana, where the lists were prepared by the Surveyor-General and reported under the act of 1849 to the Secretary of the Treasury and had been *approved* by him, that on a conflict between a resurvey and a new list made subsequent to the approval, the former being made in 1852 and the latter in 1879, that the act of 1857 operated to confirm to the State of Louisiana all of the lands *listed and approved* under the original survey, which it was alleged was erroneous.

The district judge held that the act of 1857 "Certainly has no application to those lands, the lists of which were set aside and canceled, and of which a resurvey was ordered by the Secretary of the Interior * * * * it could not revive selections which had been so far canceled by the Secretary of the Interior in the line of his duty as to order a resurvey of these lands." (Record p. 290. Assignment of error 116 p. 369.)

The Court of Appeals adopted a similar view. "The act was not intended to include a list which was in the situation of the one under which the plaintiff claims. The list had some time before been acted upon by the Land Department and was expected to stand except in so far as it should be impeached for fraud or error by the resurveys. Congress knew that these resurveys were going on. For several years it had been making appropriations therefor. * * * * new lists had been made and filed in the Commissioner's office based upon the new survey and the plats made in conformity therewith." (Opinion p. 344, assignments of error 118, 122, 123, p. 369, 370.)

These rulings seem to have for their foundation a view of the powers of the Secretary of the Interior which we submit is incorrect, as already pointed out, but outside of that are founded on an entire misconception of the facts.

The surveys in this town were not *in fieri*. They had been completed in 1839. All of the public lands had been offered in 1840, and sales of land had been made in the very sections in controversy based on this survey, as late at least as 1853. Plaintiff offered to show further facts, but the court excluded it against its objection. The new plat was not received at the Register's office until June 3, 1858. (testimony of Palmer pp. 49, 50, 52, 53) and it was only upon receipt of such plats that he was authorized to use it in place of the old one. (Exhibit 69 p. 83.)

No new list was prepared by the Surveyor General until May 13, 1858 (Exhibit 124 p. 177), and not received at the General Land Office until May 20, 1858 (Exhibit 126 p. 178), and the Secretary of the Interior made no new approved list in this town until 1866. (Exhibit 127 p. 179.)

The only *fact*, therefore, tending to show that the old survey and the list founded upon it was canceled is that a resurvey was in progress in the last quarter of 1856. It is submitted that this is not inconsistent with retaining the old list, nor does it *ipso facto* work a revocation of it, and particularly so if *any vested right* had attached in favor of the State.

The land department did not recognize it. December 22, 1858 Commissioner Hendricks recognizes the list as in force, and proposes to ask the Secretary at some subsequent time to revoke it. (Exhibit 23, p. 32.) Commissioner Wilson canceled railroad selections in 1868 because of this selection (Exhibit 151 p. 210.) See report General Land Office, 1864 (Exhibit 122 p. 174.)

Executive document No. 86, 34th Congress, 1st Session, vol. 14 Senate Documents, contains a very full report, (which extracts have already been given) by Secretary McClelland under date of June 25, 1856, which shows the department, as well as Congress was seeking, in some manner to settle *all* the difficulties. The report is made in response to a resolution requesting:

"Information as to what legislation, if any, is necessary to give full force and effect to the act, known as the 'swamp land law' and to *quiet all conflicts and disputed titles arising under the Federal and State governments, respectively*." The Secretary says: "I think the whole matter addresses itself to the favorable consideration of Congress, and that while action of the State agents, which either from design or carelessness, has resulted in their reporting land as swamp, which in fact was not, is to be deprecated, yet *the greatest liberality should characterize any legislation* designed to remedy evil resulting from such action to innocent purchasers from the States upon the faith of such selections." The Commissioner points out that "The States of Michigan and Wisconsin, the former by legislative enactment to that effect, and the latter by the choice of the chief executive thereof, elected to receive those lands which by the field notes of the surveys were shown to be swamp and overflowed." He then details the method of making up the lists, a reference to which has already been made, and after giving the history of the passage of the act of 1850, says: "From the earliest day we were in receipt of letters protesting against the approval of portions of the lands selected," because of the alleged fraudulent character of the selections, and *on such an allegation they were withheld from approval, or from patent, if approval had already been made*, and as soon as it was found that this rule existed, "many parties in different sections of the country availed themselves of it, and many succeeded in obtaining rejection of the State's claim."

"At the outset this contesting was confined principally to parties who had purchased or located lands at the United States Land Office prior to their selection for the States, but after the passage of the graduation law of the 4th of August, 1854, by which the government minimum for most of the lands was reduced below that fixed upon the States, it became much more general." The Commissioner then points out

several of the difficulties which have arisen and the means taken to adjust them, and finished his report with the following: "The proposition to confirm by the Act of Congress, *all selections heretofore made* involves the opposing interests of those who may have made purchases from the States and those who are contesting the right of the States under the grant; and it is more properly the subject of the legislative consideration and discretion than of executive judgment. Such an act would relieve this office, as also the district officers, of great labor in the examination and decision of the contests; but that circumstance could have but little weight in settling any principle."

The Commissioner in his report for 1856 (Ex. Doc. 1, 34th Congress, 3d Sess.), refers to this report, page 201, and again makes his recommendation for legislation to settle the difficulties. On page 175, he says: "The difficulties in executing satisfactorily the swamp land grant still exist. Several of the States have passed laws donating these lands for specific purposes, and they now complain that if the selections are set aside for any cause, their faith must be violated. It is contended that most of those who are contesting the rights of the States are mere speculators, and should not be permitted to defeat their permanent interests. That thereby many of the counties and their people will be injured, and the government not correspondingly benefitted. Much of this is true and, although many errors have been committed, yet it is worthy of consideration whether under all the circumstances, it is not the best policy *to approve the selections so far as they no not interfere with the actual settlers.*"

If it be true, that the approval of the Secretary of the Interior did not complete the identification, and that identification was only complete upon the issue of patent, then it would seem to be clear that the act of March 3, 1857, operated to put an end to the question of identification and comfirmed to

the State the title to the lands contained in the Surveyor-General's list, thus ending the controversy.

The plaintiffs clearly brought themselves within the act of 1857, by showing by the witness Palmer that the lands were vacant and unappropriated and not interfered with by actual settlement under the laws of the United States on the 3d day of March, 1857, (Record p. 48) and by showing that the list containing the lands in controversy, Grand River No. 1, (Exhibit 26, p. 36) was transmitted by the Surveyor-General to the Commissioner of the General Land Office March 31, 1852, (Exhibit 11, p. 24) and was acknowledged by the Commissioner April 13, 1852, (Exhibit 12, p. 25).

## VI.

THE STATE IS NOT ESTOPPED BY ITS ACTS OR CONDUCT RELATIVE TO THE RESURVEYS OF THE LAND IN CONTROVERSY, OR GENERALLY WITHIN THE STATE, AND HEREIN OF THE TESTIMONY BEARING ON RESURVEYS BOTH PRIOR AND SUBSEQUENT TO 1850, AND THE EFFECT OF LISTS OF LANDS FOUNDED ON SUCH RESURVEYS; AND FURTHER, OF THE EFFECT OF ACT OF MARCH 11, 1861, OF THE LEGISLATURE OF THE STATE OF MICHIGAN.

The matter of resurveys and the course of proceeding in reference to them both on the part of the State of Michigan and the United States is discussed quite at length by the opinion of the Circuit Court of Appeals, and its purport and conclusion is perhaps shown in the following extracts. (p. 338) "While it is not now questioned that the act of 1850 transferred the title to the granted lands *in presenti*, yet the identification of the lands so that the grant should attach to particular parcels was another matter, and whether a selection of lands was intended to be provisional or final was a question of intention to be gathered in the light of all the circumstances. And while we cannot refer to the understand-

ing with which the law was executed to construe the Act of Congress, we think it is competent, if such understanding of the law can be ascertained, to take it into consideration in determining the consequences intended by the parties from their acts."

(p. 340) "We are, therefore, of the opinion that it was not intended by the Secretary of the Interior, nor expected by the State, that the selection of swamp lands certified and transmitted to the Governor on the 13th day of January, 1854, and which included the lands claimed by the plaintiff, should be necessarily final, but that it was intended to be subject to correction to the extent that the facts shown by the resurveys should require, and that upon its being proven by the resurvey that these lands were not swamp, it was competent to supersede the selection by a correct one."

While the court (p. 345) declined to recognize an estoppel in the form as urged by the defendants, we conceive that the effect of the statements above quoted is substantially the same—that is, the State is bound by its acts (as the court finds its intent) whatever may be the proper construction of the act of Congress.

The grounds of estoppel urged naturally fall into three divisions: (1) The resurveys prior to 1850, and participation of the State therein; (2) The resurveys subsequent to 1850, and (3) the making of new lists and issue of patents for lands included in such lists, and the alleged adjustment based on the acts of Michigan of March 11, 1861.

1. February 1, 1842, the Legislature of the State of Michigan adopted a joint resolution, reciting that large districts of land had been returned by the United States deputy surveyors as surveyed where no surveys whatever had been made, or where the surveys had been imperfectly done, and requests the President of the United States to cause certain townships mentioned to be resurveyed. This act is set out in full in the Record as part of Exhibit 57 (p. 65). A copy of

the act was transmitted to the President by Governor Barry, February 3, 1842, (Exhibit 57, p. 64), and referred by the President to the Land Department. February 17, 1842 (Exhibit 58, p. 65), the Commissioner of the General Land Office reports and suggests that the matter be referred to the Surveyor-General at Cincinnati for a full report of the facts; and the President approves of this course, and advises the commissioner to inform the Governor of the State of Michigan of what had been done. February 21, 1842 (Exhibit 59, p. 67), the Governor is advised of the action taken by the President and the Land Department. Surveyor-General Haines, March 4, 1842 (Exhibit 60, p. 68), reports to the Commissioner, showing how it was possible that errors might have arisen, and suggests that an experienced deputy be sent to examine the districts alleged to have been fraudulent, and upon his report proper action can be taken. Surveyor-General Haines, was instructed, April 2, 1842 (Exhibit 61, p. 74), to cause the districts alleged to be fraudulent to be examined by a competent surveyor, and a copy of these instructions were sent to the Governor (Exhibit 61a, p. 74). William A. Burt was employed for this purpose (Exhibit 62, p. 75), and furnished with maps and notes of the surveys alleged by the resolution of the Legislature of Michigan to be imperfectly surveyed. Mr. Burt's report was forwarded to the Commissioner of the General Land Office, August 1, 1842, (Exhibit 63, p. 77). The Surveyor-General, in his report for 1843, suggests an appropriation for the purposes of resurveying "erroneous and defective surveys north and west of Saginaw Bay in Michigan" (p. 103). Another appropriation was recommended by the Surveyor-General, in his report for 1844, "for resurveying forty-four townships of erroneous and defective surveys west of Saginaw bay" (p. 109). A recommendation is made in the report for 1845, by the Surveyor-General, "for resurveying fourteen townships of erroneous and defective surveys west of Saginaw bay" (p. 110). In

1848 the Commissioner recommends an appropriation "for the correction of erroneous and defective surveys in Southern Michigan" (p. 112), which last appropriation, if granted, would cover the period ending June 30, 1850. In the report for 1849 the Commissioner recommends an appropriation "for resurveying and correcting erroneous and fraudulent surveys in Michigan," this appropriation for the period ending June 30, 1851 (p. 124).

November 5, 1849, the Surveyor-General, in his report, gives a schedule table, L (page 300), executive document No. 1, 31st Congress, first session (not in Record), showing the townships that had been resurveyed in Michigan up to the date of his report. From this table, and the maps O and P, attached to the report, it appears that all of the townships mentioned in the resolution had been resurveyed excepting townships 25 north, ranges 1, 2 and 3 east; and from map G, in the reports of the Surveyor-General for 1857, by which time the surveys in Michigan had been completed, it would appear that these towns were never resurveyed. In addition to those included in the resolution, towns 21 north, ranges 9, 10, 11 and 12 west, and 15 north, range 6 west, together with seven fractional townships bordering on Saginaw bay, had also been resurveyed. As fast as the plats of the resurveys in these towns came in the Registers and Receivers seem to have been instructed to no longer use the plat of the old survey in making their sales, but sales should be made from the plats of the new survey.

> Blake, Commissioner, to Reg. and Rec., October 1, 1844 (Exhibit 69, p. 83.)

During this period, also, various parties made inquiries as to the course of the resurveys, and the representatives of the State of Michigan in Congress seem to have assisted in the procuring of some of the appropriations. (Exhibits 64, page 78; 67, 80; 68, 82; 71, 72, 87.) The whole course of action

in relation to the resurveys prior to 1850 is quite fully detailed in the report, signed "Moses Kelly, Clerk," under date of February 14, 1851 (Exhibit 75, p. 96), which gives a full resume of matters particularly referred to above.

Had plaintiff's title related to parcels situated in the towns mentioned in the resolution of 1842, it might possibly then be made to appear that this testimony had some bearing upon the subject matter.

It is noted that in none of the resurveys which were had, either on the request of the State or otherwise, prior to September 28, 1850, the township in controversy is involved. The most that does appear upon the record is the statement of Mr. Burt, contained in the report of the Surveyor-General for 1849, and incorporated as table N, extracts from which are given on page 95 of the Record concerning Nicholson's surveys. This report certainly was disposed of by the action of the Secretary in 1853 in approving the lands, as already pointed out. Further, the various recommendations of the Surveyors-General for appropriations for continuing the work, all refer to appropriations for the work recommended by the Legislature of Michigan, except, possibly, that recommended in the reports for 1848 and 1849, and it is to be noted that in all of these recommendations, except in 1849 it is only the correction of erroneous and defective surveys that are mentioned. None of these recommendations of the Surveyors-General or Commissioner of the General Land Office refer in any manner to the township in question, and as to the recommendation of 1848, even after the appropriation itself was made, the Surveyor-General was at a loss to know how to use it up, for, in his report, under date of November 5, 1849 (Rec., p. 89), he says: "No contracts have been made for the resurveys under the appropriation of the last session of Congress, for the reason that to enter into such contracts understandingly it was necessary to procure more full or definite information in relation to the character of the defective surveys than has been

heretofore in the possession of this office." The appropriation based on the recommendation of 1848, and that on the recommendation of 1849, were still unexpended in 1851 (Report of Surveyor-General, 1851, Record p. 105-106.) Certainly the record fails to disclose any determination on the part of any of the land officers to resurvey the town in question at the time of the passage of the act of Congress of September 28, 1850, and we hear nothing of it until six years later.

The only connection the State had with the matter up to 1850 was the resolution of 1842.

In all of these transactions no thought was had of the swamp land grants. The State had no particular interest in the matter as a land owner. It was wholly immaterial to it how many or what towns were resurveyed. It does not appear that it had any knowledge of the course or extent of the proceedings in this behalf. The general government was surveying its own property and the whole proceeding was under its control.

2. The testimony relative to resurveys subsequent to 1850 was largely extracts from the reports of the Commissioner of the General Land Office and Surveyor-General for the years 1850 to 1858, inclusive, with a few letters passing between the Commissioner of the General Land Office and the Surveyor-General, covering the same period.

The report for 1850 (Exhibit 76, p. 101), contains a report from the Surveyor-General showing the progress of resurveys under prior appropriations. The course of this work is set forth (Record, p. 102), as follows: "Resurveys have also been made in other districts that were reported fraudulent in the field notes of examinations made last year, but, as those examinations *were made in a superficial manner*, giving, it is true, sufficient evidence of the imperfect character of the original surveys in each district, but not in every township, the *deputies intrusted with the surveys* were required before commencing the resurvey of any township to ascertain the char-

acter of the old surveys, and not to make any resurveys where they were unnecessary."

March 5, 1851, Mr. Noble, the Surveyor-General, reports to the Commissioner a plan of operations for the coming year and suggests (Exhibit 77, p. 103), "It is important, also, that the defective surveys in the Lower Peninsula should be adjusted in some way, either by an entire resurvey, or as has been done by Judge Burt in the Nicholson contract, by re-establishing and correcting the old surveys as far as practicable, and where any part of the original survey is wanting, supplying the deficiencies by new work." In the report for 1851 (Exhibit 78, p. 105), the Commissioner states that the correction of the defective surveys is a work designed to be performed with proper caution, "*and to make the old lines and corners available wherever found.*" The Surveyor-General reports (p. 106) that, owing to the prosecution of certain suits against former deputies, the appropriation of the last year for resurveys is still unexpended, and says that "exclusive of these contracts now under adjudication, and those now resurveying under your instructions the present season, embracing a few townships near Grand Traverse Bay, it is not known to this office that any pressing necessity exists for further resurveys."

February 10, 1852, (Exhibit 79 p. 107), Mr. Noble, Surveyor-General, submits a plan of operations for the work of that year. He seems to think (p. 141) the instructions of the Commissioner of the 25th of June last are of a restricted character, and seems to think some discretion should be left to the deputy in charge of each case. He says it has been the design of the office to disconnect the examinations from the resurveys, although the expense has been somewhat increased, "Yet no resurveys could be ordered without such a preliminary examination, nor could it be *expected* that a deputy would enter the field with the expectation of receiving no compensation for his examinations *unless he were assured of sufficient work in the resurveys* to compensate him for such extra services."

He also states that the returns of some of the deputies exhibit defects in township lines, and that, however necessary it may be "to respect and retrace them," it frequently becomes necessary to supply deficiencies and to change the position of some of the boundaries, and suggests that it would appear that in any of the defective surveys the marks of the original survey should not be respected but obliterated, thus making an entire new survey of such a district (p. 109), a plan not approved by the department.

Commissioner Butterfield, in a letter of March 8, 1852 (Exhibit 80, page 112), instructs the Surveyor-General that where a portion of the lines are found in a township to have been actually surveyed, and they can be retraced, they are to remain undisturbed and be respected, whether sales have been made in that town or not, but where there is no evidence found of any good intent on the part of the deputy surveyor to comply with the terms of his contract, and in case of "an entire absence of marks and monuments whereby to designate the corners, and where no lines are traceable," any old irregular lines and corners are to be carefully obliterated and a new survey made, but if settlers are found upon any of the tracts their boundaries are to be preserved if they insist upon it.

The reports for 1852 and 1853, (Record, p. 113, 115), dwell largely on the difficulties attending the preparation of the swamp lists and the consequent delay in issuing patents.

The reports for 1854 and 1855, (Record p. 119) shows the resurveys still in progress. In the report for 1856 (p. 122), the Surveyor-General intimates that he is about closing the public surveys in the State, the report for 1857 states the closing of the Surveyor-General's Office and its removal to St. Paul (p. 122).

The appropriations for resurveys during this period were made in 1850, 1851, 1854, 1855 and 1856, and were "for resurveying and correcting erroneous surveys," and "for con-

tinuing the examinations and corrections of old, imperfect and defective surveys," and "for the resurvey and correction" of a certain number of townships.

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| 1850. | 9 | Statutes | at | Large, | p. 530 (September 30). |
| 1851. | 9 | " | " | " | p. 611 (March 3). |
| 1854. | 10 | " | " | " | p. 565 (August 4). |
| 1855. | 10 | " | " | " | p. 660 (March 3). |
| 1856. | 11 | " | " | " | p. 86 (August 18). |

None of these reports of the Surveyor-General, or the correspondence between the Surveyor-General and the Commissioner of the General Land Office, mention a resurvey as necessary for township 18 north, range 3 west, except the intention to make such a contract expressed in the report of the Surveyor-General, November 1, 1855, and the mention of the completion of the survey in 1857.

It would seem that the question of the character of the land itself, whether it was swamp and overflowed, so as to be unfit for cultivation, was a question wholly distinct from the question of the defective character of surveys. The primary purpose of the surveys was the establishing of lines and corners, so that any particular parcel of land could be found, and it is easily seen that a survey might be defective as to the establishment of corners and boundary lines and yet the general character of the land be the same under a perfect survey as to such corners and lines as under the one alleged to be erroneous, and that a resurvey for the purpose of re-establishing those lines and corners be had without affecting in any essential particular the character of the land.

That the survey of this township, made in 1839, was sufficiently perfect to enable the general government to sell land from it for a period of nearly eighteen years before a resurvey was ordered, and a period of nearly fourteen years before the Secretary of the Interior approved the land in controversy to the State of Michigan, and that this survey was

sufficiently complete in its description of the land to enable the Secretary of the Interior to declare the land to be swamp, notwithstanding the allegations of fraud which were made and had been made some time prior to his approval, has already been made quite clear. The map of resurvey shows that these old corners were found and retained by the new survey.

This had been the instructions of the department prior to 1850. February 17, 1842, the Commissioner instructs the Surveyor-General (p. 67) to inquire into the "state of those surveys and their completion on the field without disturbing the titles which may have already or shall have become vested" "according to the original marks." And in the instructions under which the resurveys were prosecuted, of April 2, 1842 (p. 74), he is directed to "be particularly careful in your instructions to the deputy to prevent any departure from the original marks made on the ground in the existing surveys which would disturb the title acquired by purchasers, and the amended field notes should show by references to marks that they have been found and adopted." And in 1849 (Exhibit 73, p. 88), the Surveyor-General, referring to instructions sent him in June of that year, quotes from it as follows: "That the deputies who may be intrusted with the correction of the erroneous surveys be especially instructed to re-establish all the original lines and corners where they can be clearly identified, and where they cannot, to resurvey them in strict accordance with the original field notes, apportioning all errors and discrepancies of the course and distance among the boundaries of sections affected thereby."

The wonderful report of Mr. Burt, extracts from which are found on pages 94 and 95, refers almost entirely to the manner in which the lines have been run, making but very little, if any reference to the character of the land as shown by the notes. Mr. Burt, in making the resurvey of the district surveyed by Nicholson, upon whose contract he was a surety, which contained ten townships, resurveyed but five of them

entirely, and the others but merely corrected, so that in the report of 1850 this district is reported to now be in good condition (pp. 101-2.)

No different instructions as to the manner in which the resurveys should be conducted were ever given. Moreover the State in 1850, if it can be charged with knowledge of the contents of the public reports of the General Land Office, (and it had no other information) had no reason to anticipate any general and extensive work of resurvey. We have already shown how all of the work requested in 1842 had been completed prior to 1850.

In the report for 1845, at p. 2 (not in Record), the Commissioner says: "In Michigan, the great Southern Peninsula has all been surveyed and the lands offered for sale, with the exception of a body of twenty-three townships reported to be of an inferior quality." In the report for 1846, at p. 2 (not in Record), the Commissioner of the General Land Office again stated that, "In Michigan, all lands which have been attached to land districts, except a few townships not considered very valuable, in the Southern Peninsula, have been duly offered," and on p. 40 (not in Record) of the report, the Surveyor-General, stating the condition of the surveys, says that there remain but ten townships "of erroneous and defective work * * to be resurveyed, and these, with the subdivision of twenty-three unsurveyed townships north of the third correctional line, and of about three and one-half townships in the Manistee reserve on the border of Lake Michigan, will complete the surveys of this peninsula."

It is quite apparent, therefore, that at this time the surveys in the Lower Peninsula at least were practically closed, and that with the completion of the surveys of some unsurveyed portions of the Upper Peninsula the surveying business of the district of Indiana, Ohio and Michigan would soon be closed. The resurveying, however, of the districts called for by the resolution of the Legislature of Michigan of 1842, apparently

opens to the parties engaged in the business of surveying a very fruitful source of revenue, the contract price being nearly double that formerly allowed, and one which they were loath to relinquish, for, we soon find, the Surveyor-General finding some reason for a continuation of the surveys, and particularly the business of resurveying. And it was not until the rather tart letters of Commissioner Hendricks in 1857 (Exhibits 171, 173, 175, pp. 253-259), that the matter was finally closed, at which time nearly three hundred and fifty townships had been resurveyed, and the reports of 1856 and 1857 would indicate that the foundation had been laid for resurveying at least seventy-five to eighty townships more, the reports of the fraudulent character of which was equally as strong as that upon which the previous surveys had been founded.

It is upon the reports of the Surveyor-General for the years 1850 to 1856 in which we are gravely informed "there is a high probability," or that there is "reason to believe," or that certain districts are "strongly suspected," or that "it is feared," and the statements that an examination had been made of some few miles of section lines in a district of from ten to twenty townships, or an examination of a portion of a township in an entire district, upon which the remarkable deductions were made that the entire district, not only in that contract but in other contracts, were fraudulent, that the resurveys were continued. In no place do we find mention of any connection with the State of Michigan.

It is submitted by the plaintiff in error that the testimony relating to the character of the old surveys was wholly irrelevant and immaterial, inasmuch as the whole matter would be concluded by the action of the Secretary of the Interior in reference to the lands in controversy in this suit. If it be true that the Secretary of the Interior had identified this land, as claimed by the plaintiff in error, as swamp, inuring to the State of Michigan under the act of Congress, then it was immaterial as to the character of the testimony upon which he passed,

and as he had before him all the allegations of fraud upon which the subsequent resurvey was had, the whole matter must be deemed concluded by his judgment expressed in the listing of the lands to the State.

If the contention of the defendants be true that this approval was revoked, then the character of the survey, or the character of the land itself, would be entirely eliminated from the controversy by reason of the operation of the act of March 3, 1857, as already pointed out. If the question of the character of the land be open in any respect, then the testimony, so far as it relates to the town in question, is immaterial and irrelevant, because the survey, made in 1856, is not a showing of the character of the land in 1850, and it is as to the character of the land at that time that the proof must relate, both under the act of Congress and the arrangement between the State of Michigan and the Secretary of the Interior for the use of the field notes.

Certainly the production of testimony having any tendency to show irregularities in the surveys of other townships than the one in controversy, or tending to show a fraudulent representation of the character of the lands in such other towns, cannot have any bearing upon the question as to the character of the lands in the town in controversy in this suit.

If the purpose of the testimony was to show that the Secretary of the Interior was imposed upon by the evidences of the old survey which he had in his possession, because of its fraudulent nature, as alleged, then we submit that in an action of ejectment such testimony is improper as an attempt to set aside the judgment of the Secretary of the Interior in a collateral proceeding. And even in a direct proceeding it would not be admissible under the doctrines of *U. S. vs. Throckmorton*, and other cases cited *supra*.

3. The State never assented to the use of the lists alleged to be based on the resurveys as a basis of making up approved

lists, nor acquiesced in any alleged cancellations or revocations of approval by reason of the coming in of such lists.

It should be borne in mind that the State was not bound to make any claim for lands under the grant; its rights in no way depended on such action.

U. S. vs. Louisiana, 123 U. S., 32, 37.

It is not contended that the State had any intimation that the resurveys would have any effect upon the grant until 1855, or more than a year after the list Ionia No. 1 had been received and the Governor had requested patents to issue.

On February 24, 1855 (Exhibit 119, p. 171), Mr. Wilson, the Commissioner, wrote to Governor Bingham, stating: "The Surveyor-General of Michigan has transmitted to this office a list of swamp and overflowed lands in the Cheboygan district, Michigan, in townships 'resurveyed and platted,' which list 'abrogates and supersedes all lists of swamp lands heretofore made of the townships contained within it.' Said list embraces the following townships: * * * The originaf selections in the foregoing townships, made from the defective plats, were approved in lists Nos. 1, 2 and 3 in the Ionia district, Michigan, certified copies whereof were transmitted to your predecessor, January 13, 16 and 18, 1854. In consequence of the alteration necessary, by reason of the list recently received, I have the honor to request a suspension of all action upon the lists heretofore furnished you, so far as these several townships are concerned, until the differences can be ascertained and adjusted." This communication was never replied to, indeed the Governor had no authority to consent to such an arrangement as was suggested by the Commissioner, so far as the list superseding and abrogating the lands embraced in the approved list. Governor Barry had declined to elect whether the State would receive its grant upon the basis of the field notes or otherwise, and referred the matter to the Legislature, which is the representa-

tive of the State so far as property belonging to the State is concerned. The Legislature can authorize by law certain of its officers to dispose of its property, or to manage and control it, but their authority proceeds from the Legislature. That body has never authorized the Governor of the State to surrender any of its rights to lands granted to it, unless the particular lands and the particular authority is vested in him by the statute. This has never been done with reference to the swamp land grant. The letter recognizes the fact that there must be an adjustment before the resurvey can have any effect upon the rights of the State.

The annual report of the Commissioner of the State Land Office for the year 1855, (Exhibit 120, p. 172) refers to this letter, and states: "This office was notified in February last, by letter from the Commissioner of the General Land Office, of the resurvey by the general government of considerable tracts of land, embraced in the lists of swamp lands, including several townships in the northern part of the State, situate principally in the Ionia land district, and the same have been, as directed, marked as suspended on our books. Information has also been received from the Surveyor-General's Department that resurveys of a large number of townships in which swamp lands are included, in the northern part of the State, have been in progress the past season. Whether any material difference in the quantity of land inuring to the State under the Act of Congress will be effected by such resurveys cannot as yet be ascertained."

No action was taken by the Legislature upon this report. The report simply recognized the fact that the general government are surveying its lands, and are making out new lists of swamp lands, but whether the grant to the State will be increased thereby or not was not known, and the resurveys and the new lists were not recognized as affecting the status of the arrangement which had already been entered into.

The report for 1856 of the State Land Office mentions the delay in receipt of patents (Exhibit 118, p. 170.)

The next communication bearing on the subject received by the State authorities is the letter of Commissioner Hendricks of December 22, 1858, (Exhibit 23, p. 31).

He said: "In view of the basis adopted by the State in designating the land granted, and the numerous surveys made since the passage of the law, presents peculiarities which *require an action on the part of the authorities of the State to enable us to adjust the business with proper regard to the evidences in the case.* To present the matter is the purpose of this communication. The Surveyors-General of the district, from time to time, have reported selections in lists from the evidences of the surveys as originally made. Such selections were examined by the records of this office, and so far as they were found vacant and not interfered with by settlements, were submitted to, and approved by the Secretary of the Interior. The authorities of the State were immediately thereafter furnished with certified copies of the lists containing lands thus approved. Since such approvals were made and certified, the Surveyors-General, upon the evidences of the resurvey of many townships, have forwarded lists to supersede and abrogate the reports made in townships described therein. These subsequent selections differ materially from the former ones. The *patents for probably one-half of the townships in this condition, as originally selected and reported, were prepared and transmitted prior to the receipt of the subsequent reports based upon the evidences of the resurvey.* The balance of the selections originally made, and which are superseded by reports under resurveys, have been approved and certified, but are not carried into patent, nor can they be as thus approved, for the reason that the reports made after the resurveys are the only proper evidence upon which our action must be made in determining the grant. So far as the patents have been issued, it is not intended to make any al-

teration in the lists, but when the indemnity provisions of the act of March 2, 1855, come to be executed, a comparison between the reports based upon the original surveys and reports made after resurveys, will be made, and where the lands in the original reports do not appear in the subsequent reports, a deduction to that extent will be made from the indemnity certificate. This, it is believed, will be equal justice to all interested. The paper herewith inclosed will show in what townships the lands have been patented as first selected, and those townships in which the lands are approved but not patented, and it is forwarded with the *request that the proper authorities of the State may elect to receive the grant, with reference to those townships in which the lands have not been patented, as the selections are made upon the evidences of the resurveys.*" Accompanying the letter are two lists, found upon pages 33 and 34 of the Record.

It will be observed that the Secretary of the Interior recognized that the rights of the State had attached to the lands embraced in the approved list, although not patented, and that he wished the State to elect whether or not they would receive the grant under the resurveys or would adhere to the original surveys. The only competent authority of the State to make that election was the Legislature, and the Legislature never elected to take the lands under the list as resurveyed, or to relinquish the lands that had been designated under the original survey.

This letter from the Commissioner of the General Land Office was, on April 5, 1859, (Exhibit 157, Record, p. 221), transmitted by Mr. James W. Sanborn, Commissioner of the State Land Office, to Governor Wisner. He states that he compared the list sent by the Commissioner with the list sent to his office as a resurvey, and that the resurvey makes the amount in the list prepared by him nearly 79,000 acres less than that in the original list, "which operates against the interests of the State, not only in the number of acres, but much

more so in the quality of the land. The difference in the land now patented to the State between the old and new surveys amounts to 235,000 A., and I judge by this communication that the department at Washington do not propose to change that list, and under all circumstances in the case *I don't know why they cannot give us the patents under the old list as approved with same propriety that they have the others. The erroneous surveys were known to the department before these patents were made, and must have come within the knowledge of the department about the time Congress made the law, granting the swamp lands to the State.* * * * I hope you will look the whole matter over, and answer the inclosed letter as soon as you can consistently." No answer was ever returned by Governor Wisner to the letter of the Commissioner of the General Land Office. The Legislature of 1859 had adjourned on the 15th of February preceding, and another one would not convene until 1861. In his message to the Legislature of 1861, he made no mention of the letter of the Commissioner of the General Land Office.

In the report of the Commissioner of the State Land Office for 1860, (Exhibit 160, p. 226), he said: "The complications of the swamp land question between the State and general government have not been diminished during my administration, and in view of the constantly increasing difficulties produced by delay, I commend them to your particular attention. With much care I have caused to be prepared lists conclusively showing the discrepancies which prevent an adjustment of the questions which have arisen, and add a summary thereof hereto." He then states the number of acres that have been approved to the State, and the number of acres that have been patented, which statement he thinks is very nearly correct. He further calls attention to the differences between the surveys as originally made and the resurveys as to the quantity of land inuring to the State, and then says: "We gather from the correspondence on file in this

office between the State authorities and the department at Washington, that the general government proposes to adopt throughout the resurveys as the basis of patents. * * * No patents have been received since January, 1859, and I think, therefore, *we have reason to fear that the department at Washington is withholding those about which there is no conflict, as a lever with which to compel the adjustment of the remainder in accordance with their proposition.*"

As the defendants seem to rely upon the act of the Legislature of 1861 (Appendix No. 2,) it is worth while to examine the origin of this act and its evident purposes.

The Commissioner, in his report for the year ending November 30, 1860, calls attention to the various acts, besides the swamp land act under which the State has received lands from the general government, and particularly the primary school lands, university lands, normal school lands, State building lands, asylum lands, salt spring lands, internal improvements lands. All of these latter grants were grants *of a determinate quantity of lands*, either a certain acreage or certain sections of lands being granted, and the commissioner points out that there is deficiency in these several grants of an acreage varying between 46,725.16 acres in the case of the school lands, and a fraction over 8 acres in the normal school lands, and while the Commissioner undertakes to definitely state the acreage of deficiency in these several grants, he makes no statement of this kind in reference to the swamp lands, nor does he make any claim of acreage except as he points out that there was a considerable number of acres which had been approved to the State which were not yet patented. In reference to selecting the deficiency in the amount of school lands, the Commissioner makes the following recommendation: "And, in view of the rapid alienation of the public lands from the government, it occurs to me that the interest of this fund requires that the unselected balance should be selected on the earliest possible

opportunity. I am not now aware of any law of this State, having for its object the selection of this deficiency, and therefore respectfully suggest the propriety of such legislative action as shall seem to you best fitted to attain the end sought." (Not in Record.) This report is addressed to the Legislature of the State of Michigan.

The Commissioner does point out some of the difficulties in the way of adjusting the swamp land grant, and quotations are made from this portion of the report, and are found on pages 226 to 227 of the Record.

Neither the message of Governor Wisner, the retiring governor, nor the message from Governor Blair, the incoming governor, to the Legislature of 1861 make any recommendation upon the question of providing a method of adjusting the swamp land grant; neither do they make any mention of the deficiency existing in the several grants, as mentioned in the report of the Commissioner of the State Land Office. In both messages, however, mention is made of the method of disposing of the swamp lands by the Legislature, for the purpose *of constructing roads and ditches throughout the State*, and suggestions made as to a modification of the then existing statutes on the subject, and questioning incidentally whether the method then in use was the best one for the disposition of the lands. (Documents 1 and 2, Joint Documents of Michigan for 1861.)

Evidently having in mind the report of the Commissioner of the State Land Office for 1860, Mr. French introduced in the Senate of the State Legislature, February 16, 1861, two measures, one entitled, "A bill to provide for selecting and locating the unselected deficiency existing in the quantity of lands due to the State of Michigan under the act of Congress approved May 20, 1826, and for any other land grant made by act of Congress to this State;" and the second, entitled "Joint resolution authorizing the Commissioner of the State

Land Office to adjust with the general government the conflicting claims existing between the general and State governments in relation to the several land grants made to this State, and secure patents for all unsettled balances due this State." (Senate Journal, 1861, page 478.) These measures were before the Senate at various times—the first one, for the selection of the deficiency, passing the Senate and passing the House, became a law in the form shown in Appennix No. 2. The joint resolution was lost, after being placed on its third reading before the Senate, by a vote of 12 yeas to 17 nays. (Senate Journal, page 732.)

So much of the messages of the Governors as referred to the disposition of the swamp lands under the then existing laws of the State was in the House of Representatives referred to the Committee on Public Lands. (House Journal, 1861, page 28.) Other proposed legislation relating to the same subject matter was from time to time referred to the Committee on Public Lands, and the committee was frequently requested to report upon the same subject. (House Journal for 1861, p. 267, 310, 348.) It was under the reference of the portion of the Governor's message, to which reference has been made, that the report printed in the Record (Exhibit 158, p. 222) was made, and it is quite clear from a mere casual examination of this report, and from this reference to its origin, that there was no intention on the part of the committee of attempting to show the state of the grant as between the United States and the State of Michigan. On the contrary, the sole purpose of it was to show to the Legislature the amount of lands at their disposal for the purpose of constructing State roads and ditches, and to show them the extent to which such roads and ditches had already been constructed, as appears by table A, which is not printed in the Record. It is worthy of notice that the statement of the condition of the lands in Clare county, in table B, where the lands in controversy in this case are situated, is as follows: Amount of swamp land

in, 93,720.56 acres; amount patented, 59,960.08 acres, which is the same amount as stated in the report for 1857.

From the slightest examination of Act 123 of the laws of 1861, Appendix No. 2, it is apparent that it was not intended to confer upon the Commissioner power to relinquish any of the rights of the State of Michigan to such lands as it was justly entitled under the act of Congress of 1850, or of 1857 granting and confirming the swamp lands to the State, inasmuch as he is only instructed and authorized *to select and locate the existing deficiency* in the quantity of lands accruing to the State *in conformity with the provisions of the several acts making the same*, particular reference being made to the act of Congress under which the school lands were obtained, although the act contains a general clause directing him to select lands under any other grant. It must be borne in mind that the State of Michigan, as early as June 18, 1851, by the act of its Legislature had already made its selection of swamp lands, so far as it was within the power of the State to do so, and, as to the location of the lands, that was wholly beyond the power of the State, and hence beyond the power of the Legislature to confer any such authority upon the Commissioner. To ascertain, of course, as to whether there was a deficiency in the quantity, it must first be ascertained whether there was a definite number of acres of land granted to the State by the act of Congress. It would also seem to be apparent that a power to *select* and *locate* is not a power to *relinquish the rights* of the State to lands it already had obtained or was justly entitled to receive, any more than a power to sell is not a power to mortgage.

For a construction of use of word "selection" in a similar manner see *Wright vs. Roseberry* 121, U. S. 488, 512. It was proper, and it is possible that the Legislature intended that the Commissioner should proceed to urge the department at Washington to cause patents to issue, and thus conferred upon him some of the duties which, under the Act of Congress,

rested primarily in the Governor, but it would seem quite clear that the Legislature had no intention of authorizing the commissioner to in any manner modify, relinquish or abridge the rights of the State to any of the lands to which it was entitled, either under the swamp land grant or the others coming within the act of the Legislature, and such a relinquishment was necessary to carry out the methods of settlement suggested by Commissioner Hendricks in his letter of December 22, 1858 (Exhibit 23, p. 31), and it would seem a fair inference from the action of the Legislature in refusing to pass the resolution providing for a settlement of the conflicts, that they refused to act upon or accept the method of adjustment suggested by commissioner Hendricks in this letter. Clearly this was the understanding of the Federal Land Department that the Commissioner had no such power, as will be pointed out in referring to the reports of the departments later on. That the successive Commissioners of the State Land Office urged the claim of the State under the act of 1861 is conceded, but the proofs do not show that they attempted any acts by way of relinquishment.

Commissioner Lacey (Exhibit 159, p. 225), July 10, 1861, forwarded to the General Land Office the tabulated statement B, attached to the report of the committee of the House of Representatives above referred to. This is clearly an assertion of a claim that patents be issued for such lands as appeared to be unpatented, and to which the State was justly entitled, inasmuch as the same had been approved to the State as swamp lands inuring to it under the Act of Congress, and, so far as the lands in controversy in this suit are concerned, it was a demand by the Commissioner and a claim on the part of the State that it should receive its lands in the county of Clare by the list approved by the Commissioner in 1853, upon which plaintiffs now rely.

The report of the Commissioner of the State Land Office for 1862, states: "It is with great pleasure that I am able to re-

port that my proceedings under the law of 1861, in relation to the *unpatented swamp lands* have met with a prompt response from the present Commissioner of the General Land Office," and then goes on to state the number of acres for which patents have been received up to that time. (Record p. 228).

It is to be noticed here that the *General Land Office is not aware that the Commissioner of the State Land Office has any* authority to bring about an adjustment of this grant—at least, has not authority to relinquish or waive the claim or rights of the State based on the approvals. The Secretary of the Interior, in his report for 1864 (Record, p. 174) calls attention to the discrepancy in the swamp selections in Michigan and the embarrassment which it had created between the State and the United States Government, and makes the following suggestion: "To remove the difficulty and enable the United States to give to Michigan a good title to the swamp tracts, and dispose of the residue or fast lands in such townships, it is necessary for the State to relinquish her title to the swamp tracts acquired under the old surveys, taking in lieu thereof an equal quantity of such lands described as swamp in the new surveys." As already pointed out, there was no statute of Michigan under which the Commissioner of the State Land Office had any power to relinquish the title of the State in the manner and for the purposes proposed by the general government, nor has it been pointed out that any such power has ever been conferred upon the Commissioner for this purpose. Certainly, it was never claimed by the Commissioner himself that he had any such authority under the act of 1861, and the foregoing suggestion of the Secretary of the Interior would seem to indicate that the department at Washington had no idea that he was possessed of such authority.

The remarks quoted from the report of the Commissioner of the State Land Office for 1865, from page 3 of the report (Record, p. 228), is taken from that portion of the report of

the Commissioner as *relates to primary school lands, and has no reference whatever to the condition of the swamp lands or action in relation to them.* But it is useful as showing that in the effort to adjust the slight deficiency of about 49,000 acres the department had been acting without results for nearly five years, inasmuch as the Commissioner states that "no selections on account of the deficiencies have as yet been made." And, in fact, the matter was not adjusted until 1872.

That the adjustment was not yet brought about in relation to the swamp lands, is clear by the statement of the Commissioner under the head of swamp lands, from page 6 of his report, which is quoted in the Record at page 229, where attention is called to the fact that no adjustment had been made in relation to the "Green Lands," so-called, that is to say, those lands for which the State was entitled to indemnity or scrip or warrant, as having been sold by the General Land Office prior to 1855 and 1857. The following sentence is also significant: "Fifteen years have passed away since the passage of the grant, and the difficulty seems to be no nearer a proper adjustment, or being finally settled, than when it commenced."

The report of the Commissioner of the State Land Office for 1866 makes mention of the receipt of lists covering 230,000 acres of lands, which the Commissioner says, "were omitted in former lists on account of the difficulty of making the selections, by reason of the changes made between the old or fraudulent surveys in some sections of the State, and the resurveys" (Record p. 229.)

The report of the Commissioner for 1868 (Record, p. 314) uses this language: "The entire amount of swamp lands conveyed to the State by the act of Congress has been patented, with the exception of about 40,000 acres lying in Cheboygan and Houghton counties."

It would seem however, from a comparison of this report with those that preceded it, and the following report of 1870,

that the Commissioner was in error as to his computation, for he gives the "amount in" the county of Clare at the same figures which had been given in all the reports, commencing with table in 1857, as 93,720.56 acres. This was the amount which must have been computed on the basis of Ionia Approved List No. 1, which was approved in 1853. Now, if the lists approved in 1866, and known as Ionia Nos. 10 and 11, had any effect upon this amount, it should appear in this computation of the amount of swamp land approved within that county; and if the amount stated as the amount of swamp land was computed on the basis of the approved list of 1853, as it clearly was, the Commissioner was mistaken when he reports that the total amount had been patented, because the Record shows that, as to the lands in controversy at least, and as to a large number of other parcels, no patent has ever been received.

It is quite clear from the report of the Commissioner for 1870, that he has recognized his error in making the computations in the table attached to the report for 1868, which purported to show the condition of the swamp land grant up to January 1, 1868, for he says (Record p. 313), "As the swamp lands continue to hold so prominent a position in the resources employed for the development of the State by means of supplying the country with roads and ditches, and the settlers with homesteads, it has been deemed of great importance that a full and reliable statement of the amount and condition of these lands should be placed before the Legislature at this time, and accordingly such a statement has been prepared at great labor and with the utmost regard for accuracy, and which is the result of a complete footing and computation of all unpatented swamp lands belonging to the State. This statement will appear at the close of this report in a tabular form." An examination of this statement shows that the use of the word "unpatented" refers simply to the amount that had not been patented by the State of Michigan,

because it was only such lands that could be disposed of for the purposes of constructing roads and ditches or throw open to homestead and pre-emption settlements under the then existing laws. This table purports to show the condition of the grant up to December 1, 1870, and is tabulated under the following heads: "Counties," "Original amount," "Vacant," "Homesteads patented," "Homesteads licensed," "Amount sold for cash," "Amount sold on roads, etc.," "Amount reserved on roads, etc.," and "Other grants." From this statement the total amount is given at 5,794,308.57 acres, or nearly 60,000 acres less than the amount stated as patented by the table attached to the report of 1868. A comparison of the statement by counties will show a difference of amount stated in nearly every county in the State. With reference to the county of Clare, the amount shown as patented in that county is 77,252.62 acres, or a trifle less than 16,000 acres less than the amount stated in the table attached to the report for 1868.

In none of the subsequent reports of the State Land Commissioner are tables given which purport to show the amount approved or patented to the State. If any deduction can be made from these statements at all, so far as relates to the county of Clare and the adjustment of the grant in that county, it would appear that the Commissioners were claiming and relying, not upon the lists of 1866, but relying upon the lists approved in 1853, inasmuch as through all the reports where the amount approved is given in this county, it is the amount which must necessarily have been based upon the list approved in 1853. That there was a discrepancy in these several reports is noticed by the Commissioner himself in his report for 1871, extracts from which are found in the Record at page 248. The extract given is erroneous in that there has been an accidental omission after the word "acres," and before the word "showing," in which should be inserted the

following: "The report for 1870 gave the amount patented as 5,794,308.57 acres."

No mention of the progress of adjustment is made by the Commissioner in his report for 1875, although from an examination of the Record, at pp. 183, 189, 193, 196, 197, 282, 283, 384, it is evident that the Commissioner was industriously at work endeavoring to obtain further approvals and patenting of lands. An examination of these letters will show that Commissioner Clapp was not very successful in his efforts to reach an adjustment, and he expresses this and his lack of power to act in his report for 1876. The report quotes from the Commissioner of the General Land Office for the year of 1875, and the extract shows that there was yet unadjusted nearly a million and a half of acres of land. The State Commissioner says: "From an investigation recently made, I find that a large quantity of our swamp land has been disposed of by the general government. * * * I am convinced that a large amount in cash and indemnity land is now due to the State, and respectfully recommend that the Legislature provide, *by proper enactment, for a complete adjustment of said swamp land grant.*" The Land Department thus recognizes two things: First, that the swamp land grant had not been adjusted; and, second, that there was no law of the State of Michigan under which such an adjustment could be completely and properly made. This adjustment was incomplete in every county of the State. (Exhibits, 191, 192, pp. 284, 285.)

The report of the Commissioner of the General Land Office for 1877 recognizes the same condition of things, (p. 245, Record), "The act provides that it shall be the duty of the Secretary of the Interior to make accurate list and plats of the same and transmit them to the Governors of the States, and at their request to issue patents therefor. The provisions of the law have not been fully carried out, *nor have the grants*

*to the several States been adjusted.* Lapse of time makes the adjustment more difficult."

Similar statements will be found in other documents, some of which are quoted in the Record.

See Report General Land Office, 1878, p. 103, 104.

Report General Land Office, 1882, p.9 (Record p. 245).

Report State Land Office, 1882 and 1886. Record p. 249.

Messages of Gov. Jerome and Gov. Alger. Record p. 250.

The table, made up from the reports of the Commissioner of the General Land Office, covering the period from 1855 to 1891, inclusive, shows that nearly every year during that period there have been lands patented or approved to the State, and commencing with 1880 an additional number of selections on the part of the State were added to the list already on file, so that the amount selected for the State and remaining unadjusted in 1887 was over a million and a half of acres (Record, p. 244).

The fact that some erasures and corrections were made at the request of the General Land Office in 1854 is considered by the Court of Appeals as tending to show that the lists were merely provisional. (Exhibits 98 to 109, p. 136 to 148.)

An examination will show that for the most part the errors are merely clerical and the notations such as show a conflict of rights by reason of prior sales, or subsequent locations and the like: The requests of the Commissioner were mere cautions taken to avoid litigation between claimants under the State and the United States.

That the practice of making erasures was found to be a bad one, we may infer from the fact that the diligence of

counsel for defendants has only been able to discover the few letters referred to in 1854.

The remarks of the Court of Appeals (Opinion pp. 334, 344), concerning the effects of the new lists prepared by the Surveyor-General from the resurveys as "superseding" and "abrogating" former lists, show some confusion as to the facts.

October 4, 1852, Commissioner Wilson directs the Surveyor General to transmit new lists in the towns resurveyed that season, "in *explanation* of the former ones; but you will be careful to designate them *as having been made out in lieu of the former ones*" (Exhibit 91, p. 133.) The Surveyor General neglects to do this in sending in a supplemental list within the Grand River district, and the Commissioner calls his attention to it, June 7, 1853. (Exhibit 83, p. 126.) The Surveyor General replies June 24, 1853 (Exhibit 92, p. 133), suggesting that the supplemental lists should be considered "a substitute for the original." October 29, 1853, the Surveyor General sends another list in the Grand River district, which he states "is intended to abrogate and supersede all lists of swamp lands heretofore made of townships contained within it." (Exhibit 93 p. 134.) From this time on the lists made from the new surveys *by the Surveyor-General* are so designated.

> See Surveyor Generals List, Grand River No. 3, Exhibit 124, p. 175.
>
> See Surveyor General's List, Cheboygan E., Exhibit 153, p. 213.

These lists were mere memoranda, from which the *approved lists* were made up by the Secretary of the Interior. None of the approved lists which it is claimed were made up from these new lists furnished by the Surveyor General con-

tain any statement showing that there was any intention to "supersede" or "abrogate" former *approved* lists.

See Ionia, No. 10, Exhibit 127, p. 178.
Traverse City, No. 22, Exhibit 134, p. 184.
Ionia, No. 20, Exhibit 140, p. 198.
Ionia, No. 11, Exhibit 154, p. 215.

It can hardly be contended that a list prepared by the Surveyor-General has the effect of setting aside an approved list made by the Secretary of the Interior. The Secretary could not delegate the functions of a tribunal imposed by the granting act.

It is claimed that the State has accepted lists and patents therefor founded on the resurveys, and therefore is estopped.

May 26, the Commissioner transmitted to the Governor of Michigan, a certified copy of Ionia Approved List, No. 10, and asked an acknowledgment and the usual request for patents (Exhibit 128, p. 180.) The Governor replied May 31, 1866, (Exhibit 129, p. 180) requesting patents to issue. The patent was subsequently issued and bears date, June 21, 1866 (Exhibit 130, p. 181).

Similiar transactions took place as to Ionia Approved List, No. 11, which was approved June 9, 1866, and patented December 26, 1866 (Exhibits 154, 155, 156, p. 215, 220).

It is to be noted that none of these documents give any intimation that the effect was to be that any former lists were to be set aside or abrogated by these proceedings. On the other hand such information as is contained on the face of the papers show the lists to have been made up on the basis of the State's claims: Ionia, No. 11, contains this certificate, "This is to certify that the foregoing tracts of land in the Ionia, Michigan, district were all duly selected and reported to this office as swamp land, prior to the date of the confirmatory act 3d March, 1857." (p. 217.) See also Traverse

City, No. 22, (p. 186) for a similar certificate. Lists Ionia, No. 10 and 20, (p. 179 and 198) are certified to have been made up from the "field notes" "and found therefrom to be swamp and overflowed lands."

From the foregoing review of the facts surrounding the alleged estoppel it will be seen that the Commissioners of the General Land Office in the first instance pursued the arrangement made between the Land Department of the United States and the Legislature of the State of Michigan in selecting the land by the field notes of the surveys in the office of the Surveyor-General, and approving the selections made from those field notes, and transmitting the approved lists with the maps to the Governor of the State of Michigan. The State of Michigan had a right to rely upon the approved lists so made and transmitted as conveying to the State of Michigan, in connection with the grant, the complete title to the land named in such lists, with the same force and effect, to all intents and purposes, as if the patents therefor had already been issued and transmitted to the Governor. In all these things, after the arrangement had been made between the Land Department and the Legislature, the State of Michigan was necessarily quiescent. It had nothing to do with reference to the selections. *It could not compel the Land Department to act.* The Land Department of the United States acted upon its own volition, and by no other. It will be further seen from the corresponence between the Land Department and its own officers that the Land Department determined, *without any consultation or consent of the State of Michigan, upon a course of conduct with reference to the lists of land made from resurveys.* We have not disputed the right of the United States, through its Land Department, to make as many surveys of its public lands as it might choose to do for the purpose of subdividing the townships into sections and establishing the corners of those sections, and of the quarter posts on the lines of those sections, with a view to make the surveys more

perfect or correct them in that respect, or to supply any deficiency in such surveys, but this could be done without making new lists of the swamp lands in the townships resurveyed; and unless such lists were made of additional lands which under the grant inured to the State of Michigan, the Land Department would have no right to make such new lists, so as to deprive the State of Michigan of the lands which had already been approved to it, or which had been confirmed to it by the act of March 3, 1857.

It will further be observed that the Land Lepartment assumed to make out new selections from the lists made from the resurveys of the townships, and to force their construction of those resurveyed lists as being in lieu of, and superseding all prior lists upon the State of Michigan. The Land Department *was in a position to force this construction upon the State, inasmuch as the State could not compel them to pursue a different course, or to pursue a course*, agreed upon between the Land Department and the State when a basis of selection was agreed upon. The plaintiff claimed that such enforced construction could not prejudice the right of the State, that it was in violation of the law, inasmuch as the subject matter had passed by the approval of the lists and the confirmatory Act of Congress beyond control of the Land Department of the United States. In this respect the action of the Land Department was quite similar to that pursued by the Commissioner of the Internal Revenue, enforcing its construction of the law upon the party who dealt in proprietary stamps, and we think the case of *Swift Company vs. United States*, 111 U. S., 22, applies with great force to the case now under consideration, and under the circumstances there could be no estoppel against the State from claiming what legally and justly belonged to it under the grant and identification by the approved lists.

In that case there was a continuous dealing between the wift Company and the Int ernal Revenue Bureau of the

United States from 1870 to 1878. The Swift Company were manufacturers of matches; furnished their own dies, and gave the required bonds under the statute in ordering stamps, which order was of a stated value. The Commissioner from the commencement held that the amount allowed by statute as commissions was to be paid in stamps and ~~was to be~~ not money. All business between the parties was transacted and all accounts stated and adjusted by the accounting officers upon that basis.

The Court of claims held that the facts showed an acquiescence by the claimant in the construction of the statute by the Commissioners, and such repeated settlements and voluntary receipts of stamps in payment of their commissions, in lieu of money, was such as precluded them from recovering, and gave judgment in favor of the United States. From this judgment the Swift Company appealed. The argument was on the following points: First, whether the former construction of the statute was correct. Second, whether the long acquiescence of the company in the construction given to the statute by the Commissioner, and its frequent and regular settlement of its accounts on that basis, and acceptance of same in lieu of money, precluded it from disputing the legality of the transactions Third, what was the effect of the failure to protest against the settlements which it made under the rulings of the Commissioner.

The opinion of the court sets out the course of dealing under the statute, showing that payment of the commissions had been made in stamps, and that receipts therefor and settlements had been frequently had; that the accounts were made out by the claimant monthly on blank forms prescribed and furnished by the Commissioner, in which the United States were debited with all items of money remitted and with commissions calculated on each remittance at ten per cent, and credited with the balance from previous month, and stamps received to order in the interval, and with the balance due the United States. This account was, by a memorandum at the

foot, stated to be correct, complete and true, and signed by the claimant. The opinion states: "It clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law upon which it acted through its successive commissions, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value instead of in money; that it regulated all its forms, modes of business, receipts, accounts and returns upon that interpretation of the law; that it refused on application prior to 1866, and subsequently to modify its decision that all who dealt with it in purchasing these stamps were informed of its adherence to this rule; and finally that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to the appellant that unless it complied with the exaction it should not continue in business; for it could not continue business without stamps, and could not purchase stamps except upon the terms prescribed by the Commissioner of the Internal Revenue. The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory rights. We cannot hesitate to answer that question in the negative. The parties were not no equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, "*volenti non fit injuria.*"

Many cases are cited supporting the principle enunciated. "A rule of that character deliberately adopted and made known, and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the com-

pliance was coerced. This principle was recognized and acted upon in *United States vs. Lee*, 106 U. S., at page 200, where it was held that the officers of the law have established and acted upon a rule that payment would be received only in a particular mode, contrary to the law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary to secure his rights."

In the case now under consideration the fact that the State had early adopted a policy not to sell its swamp lands until it had obtained a patent therefor from the United States, which policy continued to be acted upon by the State until at least 1883, the method adopted by the Land Department, in refusing to give patents for the lands listed and approved where there had been a resurvey either contemplated or made, operated with peculiar hardship upon the State of Michigan. It was anxious to receive patents under the grant for any lands due to it in order that such land might be disposed of to actual settlers, or for the purpose of the trust imposed by the act of September 28, 1850, in draining and reclaiming the lands, by the construction of State roads, and otherwise. In short, the State was compelled to receive what the Land Department at Washington saw fit to patent to it, and this it did without relinquishing any of its rights to demand a patent of the lands approved to the State, or of the right to dispose of such lands. The same principle declared in the case of the *Swift Company vs. United States* is stated by Mr. Bigelow in his work on estoppels, fifth edition, at page 686, where he lays down the general principle that when the situation in question had been practically forced upon a party by his opponent's conduct, he will not be bound to stand by it; citing *Potter vs. Brown* 50 Mich., 436.

*Branson vs. Wirth*, 17 Wall., 32, is a case which, we think, is in point here. The action was ejectment against

Branson and another to recover the northeast quarter of section 18 in a certain township in Fulton county, Illinois. He made title under a patent from the United States to one Leonard, dated February 20, 1868. The defendants claimed under a tax title issued under the laws of Illinois, but as public lands could not be taxed, the defendants were obliged to show that at the time the title under the tax deed originated the government title had been extinguished. To do this the defendants gave in evidence, from the records of the General Land Office, an exemplified copy of a military land warrant for 160 acres of land, issued to Giles Edgerton in 1817, the location thereof in his favor upon the lot in question on the 10th day of January, 1818, and a patent for the lot dated the same day. Edgerton executed a deed on the 29th of July, 1819, to one Thomas Hart, not for the northeast quarter, but far the southeast quarter of section 18. It further appeared that the United States had granted a patent to one James Durney, dated January 7, 1818, for the southeast quarter of section 18, which was prior in time to that to Edgerton. The defendants contended that the word "southeast" was written by mistake for the word "northeast." In rebuttal the plaintiff gave in evidence deeds for the southeast quarter from Hart to Hunt, May 12, 1824; from Hunt to Clemson, April 7, 1825; from Clemson to Shaw, October 20, 1829. He also gave in evidence an act of Congress approved March 3, 1827, for the relief of the legal representatives of Giles Edgerton, by which it was enacted that the legal representatives or assignee of Giles Edgerton be authorized to enter with the register of the proper land office any unappropriated quarter-section of land in lieu of the quarter-section patented to said Giles on January 10, 1818, which had been previously patented to James Durney, and upon such entry a patent shall issue to such representative or assignee for the quarter-section. It was proved that Shaw did enter another lot in 1838 pursuant to that act. The court instructed the jury that defendant had

not shown outstanding title to the lot in question, either in Giles Edgerton or any one claiming under him, and that the plaintiff was entitled to recover. In support of this ruling the plaintiff claimed: First, that Edgerton's patent granted the southeast quarter, and that the title to the northeast quarter remained in the United States until the issue of the patent to Leonard in 1868; and that the defendant was estopped from setting up a title in Edgerton; that defendants could assert for or under him no better title than he could for himself or his grantees. And the plaintiff argued that Edgerton by deed to Hart of the southeast quarter was estopped from claiming that his patent granted him the northeast quarter, and that Edgerton's successive grantees were bound and estopped by the recitals and facts that estopped Edgerton. They also claim that they were estopped by the act of Congress permitting Edgerton to enter another quarter-section in lieu of the southeast quarter. Mr. Justice Bradley delivered the opinion of the court, and after discussing the facts upon which they relied for an estoppel, said: "It is supposed that Edgerton and his assigns are estopped by the fact that the government was induced to give Edgerton's grantee another lot in consequence of the declaration contained in his deed to Hart. This may be ground for an equitable estoppel, not a legal one, and therefore not available in an action of ejectment where the title is in issue." And he further said: "Even were it otherwise, and if the government could in any aspect of the case claim the benefit of the legal estoppel, it would be prevented from doing so by its own patent granted to Edgerton. That would present the case of estoppel against estoppel, which Lord Coke says 'setteth the matter at large.' No one can set up an estoppel against his own grant. Whoever else, therefore, might set up an estoppel against Edgerton's title to the lot in question, the government could not do so. Its own patent would stand in the way. And whatever the government could not do, its subsequent grantees could not do." We

contend here that the government of the United States never has claimed an estoppel as against the State of Michigan. The facts recited above show conclusively that no such claim was ever intended to be made; that they have always recognized some right in the State under the approved list to the land embraced therein; but were it not so the grant and the selection by the Secretary of the Interior operated to convey the title to the State as fully as if the patent had issued, and precludes the United States by its own grant from asserting an estoppel as against the State. Nor is the State of Michigan estopped on account of its silence with reference to its claims to the swamp lands embraced in the Approved List Ionia No. 1. There was nothing which called upon the State to act in asserting its rights. The delay was occasioned by the Department at Washington, I presume, on account of the great pressure of business before that department. Certainly, it was the duty of the Secretary of the Interior to act, and nothing which the State of Michigan could do could compel the Secretary to act sooner than he chose to act. "No principle is better settled," says Mr. Justice Strong, in *Railroad Company vs. DuBois*, 12 Wall., at page 64, "than that a party is not estopped by his silence, unless it has misled another to his hurt." There is no evidence in this case that the State of Michigan has misled any one. The swamp land grant gave public notice to all persons, and they were obliged also, in dealing with the lands covered by the grant, to take notice of the selections made and approved by the secretary of the Interior, so that the title became perfected to the list of lands embraced in it. But further than this, there has been a claim made by individuals—one of them the grantor of the defendant of one of the parcels involved to these lands in suit, as public lands subject to entry and sale by the United States, and the Secretary of the Interior had decided that they were not subject to entry, and for the very reason that they were claimed by the State of Michigan as swamp lands by grant

under the act of Congress. The State of Michigan was not a party to this contention, and had no knowledge of it, so far as the Record shows, and was not obliged to take any action in the premises to protect its rights. The fact appears from the Record that the land was listed by the Surveyor-General, approved by the Secretary of the Interior before the act of March 3, 1857, and that the resurvey and listing under which the Land Department undertook to deprive the State of Michigan of its title was not made until after the confirmatory act. It is needless to argue that the Secretary of the Interior had no power to set aside the title of the State of Michigan to these lands and offer them at public sale in 1869. If the defendants were misled at all, they were misled by the Land Department, and not by the State of Michigan: (Exhibits 151, 151 A, p. 209-213.)

The position of the plaintiff in this suit claiming title through the State is farther supported by the case of *Hornsby vs. United States*, 10 Wall., 237. That was a case of a Mexican land grant, in which, after the Governor had made the grant, it was subject to the approval of the Departmental Assembly, and such an approval was a condition precedent to the vesting of the title. The court said, "With such approval the grant became, as it was termed in the regulations 'definitively valid,' that is, it ceased to be defeasible, and the estate was no longer liable to be divested except for proceedings for breach of its other conditions. Besides, it was the duty of the Governor, and not of the grantee to submit to the Assembly grants submitted by him for their approbation. His neglect in this respect suspended the definitive validity, as it was termed of the grants; that is, it prolonged the liability of the estate to be defeated by the act of the Assembly and of the Supreme Government thereon, to which the matter was referred in case the approval of the Assembly was not obtained, and no other consequence followed. His neglect was not permitted to operate to divest the grantee of the estate already

vested in them." The principle to be drawn from this opinion is, from the analogy which the facts in this case bear to that, that the grant was made by Congress, the same as in the Hornsby case, was made by the Governor, but the lands were to be selected and approved by the Secretary of the Interior, and the lands in that case were to be submitted to the Departmental Assembly for approval. In this case, like that, upon approval the land became definitively valid. It ceased to be defeasible. The estate granted to the State of Michigan was no longer liable to be divested, and likewise it was the duty, under the arrangements made between the Secretary of the Interior and the State of Michigan, for the Surveyor-General to submit the lists of the lands which would pass under the grant to the Secretary of the Interior for his approval, and it was not the duty of the State to do so. His neglect, or the neglect of the Secretary of the Interior, to pass upon the selections cannot be urged as laches upon the part of the State, nor as laying the foundation for an estoppel for not asserting rights under the grant. Independent of the act of March 3, 1857, until the lists made out by the Surveyor-General were approved by the Secretary of the Interior, the particular parcels of land granted were not ascertained, and were subject to changes which the Secretary of the Interior might make in carrying out his duty to determine what lands did pass by the grant. No other consequences followed.

*Henshaw vs. Bissell*, 18 Wall., 255. This was an action of ejectment for the possession of certain real property in the county of Butte, in the State of California. Both parties claimed the demanded premises under patents of the United States, issued upon a confirmation of grants given by the Mexican government. The plaintiff claimed under a junior patent issued under a prior grant, and defendant claimed upon a senior patent issued upon a subsequent grant not confirmed. Both patents cover the premises in controversy, and the question was which of the two original concessions gave the better

right to the premises. In deciding the case, Mr. Justice Field, in commenting upon the prior grant with the later patent, said: "The grant of land thus identified, or having such descriptive features as to render its identification a matter of absolute certainty, entitled the grantee to the specific tract named. His title, it is true, was imperfect in its character, and subject to various conditions, but when approved by the Departmental Assembly it became, in the language of the regulations of 1828, 'definitively valid,' and the estate granted was not afterwards liable to be divested except by regular proceedings on denouncement. The power of the Governor over it had ceased. He could neither revoke the grant nor impair the interest of the grantee by any attempted transfer to others." It was also insisted that the plaintiff claiming under the elder grant of the demanded premises was estopped by the conduct and declarations of his predecessor, the claimant before the Land Commissioner in claiming land under his grant situated in a different locality. And the court held after stating the grounds upon which the estoppel was based, that there was no case for the application of the doctrine of equitable estoppel. "For its application there must be some deception in the conduct or declarations of the party estopped, or such gross negligence on his part as amounts to constructive fraud. An estoppel *in pais* is sometimes said to be a moral question, and certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon negligence of one's rights have no such ingredients, and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances, that the party will be estopped from denying any knowledge of his rights; but these are exceptional and do not effect the correctness of the general rule as stated." In this case there

are no peculiar circumstances which call for the application of the doctrine of equitable estoppel to prevent the State of Michigan from claiming its rights to the land selected and approved. The title passed to the State upon approval of the lists Ionia No. 1, and the map thereof prepared and transmitted to the Governor of the State, and, as was held in the case just cited, this approval, although the patent had not been issued, had all the force and effect of a patent.

See also *Hardin vs. Jordan*, 140 U. S., 371, which we consider a case in point.

The case of *Brant vs. The Virginia Coal & Iron Company et al.*, 93 U. S., 326, was a case where it was claimed that the plaintiff was estopped from claiming title to the land in question by virtue of the relation which those through whom he claimed bore to the legal title. On page 332, of that case, it was said by Mr. Justice Field, "The disposition of the case depends upon the construction given to the devise of Robert Sinclair to his widow, and the operation of the foreclosure proceedings as an estoppel upon the complainant from asserting title to the property." It appears that the widow of Robert Sinclair, in July, 1839, having a life estate in the premises, executed a deed thereof to the Union Potomac Company for the consideration of $1,100. As security for the payment of the consideration she took at the time from the company, its bond and a mortgage on the property. This bond and mortgage were assigned to the complainant and Hector Sinclair, the latter a son of the widow, in consideration of $100 cash, and the yearly payment of the like sum during her life. Previous to this time Brant and Hector Sinclair had purchased the interests of all the other heirs except Jane Sinclair, and such purchase is recited in the assignment of the mortgage, as is also the previous conveyance of a life interest to the company. Afterwards Brant and Sinclair instituted suit for the foreclosure of the mortgage and sale of the property, and the same was sold under the decree and bid off by

one Patrick Hammill, who thus succeeded to all the rights of the Union Potomac Company. The defendants derived their title from Hammill. Brant having acquired the interest of Hector Sinclair, brought the present suit to restrain the company from mining and extracting coal, etc., from the land. It is claimed by the defendants that Brant and Sinclair were estopped from setting up that the widow only conveyed a life interest by the fact that they had foreclosed the mortgage while they were owners of seven-eights of the reversion, and as such owners they were prevented from taking a mortgage upon the life estate or purchasing the one already executed. The court held that the purchaser was bound to take notice of the title. He was directed to its source by the pleadings of the case; that the doctrine of *caveat emptor* applies to al judicial sales of this character; the purchaser takes only the title which the mortgagor possessed. * * * The court said, "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. Therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence was so gross as to amount to constructive fraud. * * * The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." (Citing authorities.) And it would seem that to the enforcement of an estoppel of this character with respect

to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable should be clearly established. * * * It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." We insist that the purchasers at the public sale of land at Ionia stand in the same situation as purchasers at judicial sales; that the doctrine of *caveat emptor* applied to them, and that they received no better title under such sale than the United States had, which was no title.

In *Ketcham vs. Duncan*, 96 U. S., page 666, it was said: "Moreover, it is necessary to notice who sets up this plea of estoppel. An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled, to his injury, and he only can set it up."

In *Sturm vs. Boker*, 150 U. S., 312, the question of estoppel *in pais* was again under consideration, and on page 333 the court said: "It is next urged, and the court below seems to have taken the same view of the matter, that the complainant is estopped from denying his responsibility for the loss of the goods, because of alleged statements made by him as a witness in the suits upon the insurance policies. It is claimed that in those suits he testified under oath that he was the owner of the goods, and thereby precluded himself from asserting anything to the contrary in this case, under the wise and salutary doctrine which binds a party to his judicial declarations, and forbids him from subsequently contra-

dicting his statements thus made. We do not controvert the soundness of this general rule as laid down in the cases cited by the defendants. * * * This language did not mislead or induce either the defendants or the insurance companies to alter or change their position in any respect whatever, nor influence their conduct in any way. Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said in express terms that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument. In *Brant vs. Virginia Coal and Iron Co.*, 93 U. S., 326, 327, it is said: 'Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.'"

Certainly, the purchasers at the land sale at Ionia had full means of ascertaining the true condition of the title to the land in question. The least inquiry would have led them to the knowledge of the fact that they were selected and approved to the State as swamp land, the legal effect of which they were bound to know or ascertain at their peril.

So, too, it is said in Everett & Stroud on Estoppels, page 310, that "a representation does not operate as an estoppel if the party making it is legally incapacitated from entering into the obligation from which the estoppel might otherwise have arisen." This principle applies to the case of a public officer whose acts are circumscribed by law, and who is not clothed

with discretion and authority to make the representation, or from entering into the arrangement.

In accordance with this principle it was held in the case of *Crane vs. Reeder*, 25, Mich., 303, which was a case founded upon an escheat of lands to the State, that it was not estopped from claiming the land as an escheat, because it had taxed the lands and sold the same for delinquent taxes, and it was said: "The doctrine that the State would waive its rights to its lands, or estop itself form claiming them by taxing them to an occupier, and taking proceedings to enforce payment of the taxes, would be rather startling to the officers having charge of the public domain, and would indicate an easy mode in which trespassers might convert their trespass into a complete ownership. * * * If the State sells for delinquent taxes, it warrants nothing and represents nothing; the purchaser takes the risk, not only of the original authority to tax, but also of the regularity of all the proceedings. Now, to entitle the party to insist upon an estoppel, he must be able to show that the other party has done something or represented something, which has had the effect to deceive and misled him, and which would render it inequitable for the right of such other party to be now enforced against him. If we inquire in this case, what the State has done which has mislead or deceived Reeder, it will hardly be replied, that taxing the land to him could have that effect by making him suppose the land his own; for taxation does not imply ownership in the person taxed, and, if it did, we could not presume the party himself to be so ignorant of his rights as to be deceived by it. Nor can it be urged that the tax-deed to Reeder works an estoppel, for such a deed is always understood as giving no right but such as comes from the proceeding itself; the maxim is, *caveat emptor*. The State, as before remarked, gives no warranty, holds out no promises, and makes no representations."

It is apprehended that the case of the *State vs. The Flint*

*& Pere Marquette Railway Company*, 89 Mich., 481, may be referred to as affecting the merits of this case upon the subject of estoppel, but upon well recognized principles it cannot do so. The plaintiff in this case was not a party to that suit, which was instituted after its grantor became a purchaser of the lands in question. The decree in the case did not effect him. He had no right to appeal, neither was he a party in any sense to the litigation. The subject matter of the two suits was different. The ground upon which persons standing in the relation to what is termed privity, which denotes mutual or successive relationship to the same rights of property in litigation, are bound by the proceedings to which he was a party, in that they are identified with him in interest. The plaintiff in this case had no opportunity to make a defense in that it could not control the proceeding nor appeal from the judgment. It could not adduce testimony, nor cross-examine witnesses adduced on either side. Persons not having these rights are regarded as strangers to the cause.

The case of *Litchfield vs. Goodnow*, 123 U. S., 549, is directly in point. That is a case where the defense set up that the plaintiff was estopped from claiming to recover the amount of taxes assessed against property which was illegally assessed by an adjudication in another case, namely, *The Homestead Company vs. Valley Railroad Company*, 17 Wal., 153. The Homestead Company case was similar in all respects to the one then before the court, to which the plaintiff was not a party, and the court held that it was no estoppel. The reason of the court in that case is conclusive in this. The court in deciding that case said: "In the condition of the parties to the record during the whole course of the litigation between the Homestead Company and those who were named as defendants, Mrs. Litchfield had no right to make a defense in her own name, neither could she control the proceedings, nor appeal from the decree. She could not in her own right adduce testimony or cross-examine witnesses; neither was she

identified in interest with any one who was a party. She owned her lands; the parties to the suit owned theirs; her rights were all separate and distinct from the rest, and there was no mutual or successive relationship between her and the other owners. She was neither a party to the suit, nor in privity with those who were parties; consequently she was in law a stranger to the proceedings and in no way bound thereby. As she was not bound, the Homestead Company and its assigns were not. Estoppels to be good must be mutual."

See also Lake Shore & Michigan R. R. Co. vs. People, 46 Mich., 193.

Furthermore, the entire claim of the State as against the railroad company, seems to have been based on the field notes and plats of survey, and none of the lands seem to have been approved to the State, nor included in any Surveyor-Generals lists filed so as to come under the act of March 3, 1857. No proof of the actual character of the land was made. The case therefore did not present facts from which the court could find that the lands were withdrawn from the operation of the railroad grant.

It is the settled law of Michigan, that under its statutes title to land cannot pass by estoppel *in pais*, nor can an equitable defense be set up to defeat the legal title.

Ryder vs. Flanders, 30 Mich., 336.

Under the statutes of frauds which has always since the formation of the State been incorporated into the body of our laws, title to real estate can only be created or conveyed by deed.

Hayes vs. Livingston, 34 Mich., 383.

## VII.

THE TAX TITLE ACQUIRED SUBSEQUENT TO THE COMMENCEMENT OF THIS SUIT, AND WHILE THE SAME WAS PENDING, WAS NOT ADMISSIBLE UNDER THE PLEA IN THIS CASE.

There can be no question but what the admission of this deed was erroneous, and that the deed should have been excluded. Such is the practice, as decided by the Supreme Court of Michigan, in actions of ejectment. If any advantage was sought by this deed it should have been reached by a plea of *puis darrein continuance*.

Jennings vs. Lockham, 99 Mich., 253.
Jenney vs. Potts, 41 Mich., 52.
Buell vs. Irwin, 24 Mich., 149.
Hurd vs. Raymond, 50 Mich., 369.

## VIII.

THE FILES AND RECORDS RELATING TO THE CASES OF UNITED STATES VS. NICHOLSON, AND UNITED STATES VS. BREVOORT, AND CORRESPONDENCE RELATING TO THE SAME, SHOULD HAVE BEEN ADMITTED IN EVIDENCE.

The questions as presented relate to the offer of the plaintiffs to put in evidence Exhibit 175A (Record p. 259), being the records and files in the case of the *United States vs. Henry Nicholson et al.;* Exhibit 175B (Record, p. 264), being the records and files in the case of the *United States vs. Henry Brevoort et al.;* Exhibit 176 (p. 271), letter of Hon. J. M. Howard to the Secretary of the Interior, dated December 13, 1850, reciting the nature of the proofs presented on the trial of the two cases referred to; and Exhibit 177 (p. 272), a letter of United States District Attorney Bates, dated February 10, 1851, to the Hon. James L. Conger, member of Congress elect; and Exhibit 178 (p. 273), a letter from United States District Attorney Bates to Commissioner But-

terfield, dated February 11, 1851. Both of the letters of Mr. Bates detail the course and probable results of the trials of the cases above mentioned.

The defendants had offered, and the same had been admitted in evidence, the letter of Lucius Lyon, Surveyor-General, dated July 10, 1849, addressed to Commissioner Butterfield (Exhibit 73, p. 88), stating in substance that from the examinations made by William A. Burt during the past three months that the field notes returned to his office by Henry Nicholson and others of surveys made under contracts executed in 1838, were fictitious and fraudulent, and that Mr. Burt had examined the districts between towns 17 and 24 north, lying west of the principal meridian, and was still in the field. But from the returns made by Mr. Burt, the surveys of all the districts examined had proved to be fraudulent. They also relied upon the report of Surveyor-General Lyon for 1849, extracts from which are found in Exhibit 74, p. 89, and attached to this report is a detailed statement of the examinations made by Mr. Burt, referring to the Nicholson and Brevoort contracts, and several others. The greater portion of it is found in table N, printed in the Record at pages 94 and 95.

It is not clearly defined in the record the grounds upon which the defendants were allowed to introduce his sort of proof, but it would seem to be that the pursose was to show that the surveys of Nicholson, which covered the lands in controversy in this case, as also the surveys made by Brevoort and others, were fraudulent in fact, and we suppose argue from that either that the surveys were in fact no surveys at all by reason of their fraudulent character, or that it was competent for the Secretary of the Interior to set aside lists founded on such surveys as lists founded upon a fraudulent suggestion. If it was the purpose of the defendants to show that the surveys were in fact fraudulent, without reference to the question as to whether inquiry in this regard was not concluded by the act subsequently taken

by the Commissioner, it would certainly seem to be competent to receive the proof offered, inasmuch as it had a direct tendency to controvert the statements contained in the letter of Surveyor-General Lyon, and in his report founded upon the report of Deputy Surveyor Burt. In each of these cases the action was founded upon the contract made for surveying the towns therein described, and the bond made in pursuance of such a contract, the plea in each case being substantially one of performance, so that the issue was squarely raised as to whether or not the surveys had been made in accordance with the terms of the contract and the obligation of the bond. In each case the matter was tried before a jury, submitted to the jury by the court, and the jury returned a verdict for the defendants, thus finding that there had been a performance by them of their contract, and thus they had fulfilled the obligation of the bond given in pursuance of the contract. Such is the purport of the letter of Mr. Howard, and of the two letters of Mr. Bates, in which the latter gives it as his opinion that even though a new trial might be ordered by reason of some rulings of the district judge of which he complained, still the result eventually reached would be that the defendants would be found to have performed their contracts.

As already pointed out, it would seem as if the whole inquiry was concluded by the action of the Secretary of the Interior, so far as relates to the lands in controversy in this suit, in listing the lands and approving the same to the State in 1853, inasmuch as that must represent his final judgment in the matter, and the testimony upon which he acted and arrived at that conclusion would seem to be immaterial. But it is the claim, as we understand it, of the defendants that the Secretary in this case acted upon the fraudulent suggestion, and therefore that it was competent to inquire into it at a subsequent period. It has already been pointed out in an earlier period of this brief that it is not every suggestion or allegation of fraud that can be examined into, or it would lay the

foundation for setting aside a judgment regularly had. If it appear that the frauds complained of were in fact before the court, and necessarily included within its inquiry made at the time, and that the frauds here complained of were such as were known to the Secretary of the Interior at the time he acted in 1853, then all inquiry into the nature or character of these frauds, or an attempt to set aside the judgment of the Secretary of the Interior founded upon them, is deemed to be concluded by the judgment of the Secretary of the Interior, as expressed in his approved list; and in any event such evidence is not admissible in ejectment. But, granting for the purposes of the argument what seems to have been in the mind of the court in ruling that the evidence offered by the defendants was admissible, and allowing it to be read in evidence, that it was proper to inquire into the allegations of fraud in relation to the evidence upon which the Commissioner acted, it would seem to be proper, by way of rebuttal, to show that the evidence presented to the Secretary of the Interior was not fraudulent, and, as sustaining that view, it would seem to be of considerable weight the fact that the very allegations of fraud upon which defendants now rely had been tried before a regularly constituted judicial tribunal, and one of high standing and great dignity, and as a result of such a trial, a verdict had been found in favor of the defendants, establishing the fact that the charges of fraud by them in the execution of their work were untrue in fact; and further, that this proof—this finding of a properly constituted court—was laid before the Secretary of the Interior before he acted in approving the lands in 1853. In other words, it would seem to have a clear tendency to show that the Secretary was not deceived in any manner, but notwithstanding the allegations of fraud, he had examined the matter and concluded that the verdict reached by the jury, under the direction of the United States Court for the Eastern District of Michigan, was correct.

If it was proper to go into the matter at all for any reason,

it would certainly be proper to present to the court all of the matter upon which the Secretary of the Interior must have acted. That the Secretary was in possession of these facts is shown by the letters of Mr. Howard and by the letters of Mr. Bates.

The rejection of this evidence, offered on the part of the plaintiff in error in rebuttal, was clearly erroneous, if that of defendants was admissible, and the evidence should have been admitted.

## IX.

We believe that the foregoing discussion has demonstrated that the title to the lands in controversy passed to the State of Michigan under the terms of the Act of Congress of September 28, 1850, which was a present grant, wanting but identification to attach to particular parcels; that this identification was made complete by the act of the Secretary of the Interior in listing the lands in Approved List Ionia No. 1, under date of October 27, 1853, and the transmission of this list to the Governor of the State of Michigan, January 13, 1854, and the preparation of a map upon which said lands were colored red, under date of March 9, 1854, and the transmission of said map to the Governor of Michigan under date of March 13, 1854, and the request of the Governor for patents based on said list of January 31, 1854; that thereby the title to the particular lands in controversy became complete and perfect, and was vested in the State of Michigan as of the 28th day of September, 1850; that the title, so made complete and perfect, did not depend upon the act of the Secretary of the Interior in identifying the lands in the manner above set forth, but was vested by and depended upon the Act of Congress itself, and hence that the want of a patent could not in any maner affect the right of the State of Michigan to the lands in controversy, and its title to it was complete and perfect without such patent; that the title, thus hav-

ing passed to the State of Michigan, and being made perfect by the act of identification upon the part of the Secretary of the Interior in 1853, it was thereafter beyond the power of the Secretary of the Interior or the Land Department to recall that title or in any manner abridge it by recalling, modifying, revoking, or attempting to modify or revoke any of the instruments of identification which he had seen fit to transmit to the proper officers of the State of Michigan; that having passed beyond the power of the Secretary of the Interior in this behalf, it could only be recalled or canceled by a judicial action, prosecuted on behalf of the United States in a court of proper jurisdiction; that this not having been done in any manner in this case, so far as relates to the lands in controversy, the title was perfect in the State of Michigan, and has passed to the plaintiff. The Court of Appeals in its opinion (p. 339), "The reports of the Commissioner of the State Land Office showed it, and the Legislature of 1857 enacted a statute to forbid sales of lands before patents were received. That statutory provision has ever since been in force. Section 2 of Act 130 of the Laws of Michigan for 1883, upon which Sparrow obtained patents for the lands here claimed by the plaintiff seems to indicate that the lands appropriated by the State and authorized to be patented, were lands which were subject to sale, and as these were not, because no patent had been received for them, we have difficulty in finding the authority by which the patent issued to Sparrow. This is a question not submitted by counsel and therefore we do not pursue it."

The reason the question was not submitted by counsel was because the question had already been determined in favor of Mr. Sparrow by the Supreme Court of the State of Michigan.

*State of Michigan vs. Sparrow*, 89 Mich., 263. In this case the patents to Sparrow were attacked on several grounds,

and among others because "The lands had not been patented to the State, nor offered at public auction" under the act of 1857, cited above. The court then pointed out (p. 270) how the State had by acts of the Legislature in 1851, 1855, 1863, 1867, and 1885, granted and disposed of swamp lands for which no patent had been received, and finally disposes of the granting clause in the act under which the Sparrow patents were obtained on the authority of previous decisions of the court. The action of the State is dismissed and the patent to Sparrow sustained.

The title, being perfect in the State of Michigan, and having thus passed beyond the control of the Secretary of the Interior and the Land Department of the United States, this department was without any jurisdiction in the premises, and its attempt to convey the title to William A. Rust and to Addison P. Brewer, from whom defendants claim title in 1867 and 1870, was wholly without jurisdiction, and the paper title thus made is absolutely void and conveyed no title whatsoever as against the plaintiff, or the State of Michigan, through whom it claims the lands in controversy in this suit. Moreover, the title of the plaintiff being in the State of Michigan as of the 28th day of September, 1850, was the elder title, and as such must in this action of ejectment prevail.

We submit, therefore, that the direction of the verdict for the defendant by the district judge was, under the evidence, erroneous, and that the verdict should have been directed for the plaintiff, as it requested in its eleventh request to charge (Record, p. 288), and that the judgment of the Court of Appeals affirming the judgment of the Circuit Court should be reversed.

J. W. Champlin,
Frank E. Robson,
Attorneys for Plaintiff in Error.

# APPENDIX NO. 1.

## No. 187.

An act to provide for the sale and reclaiming of swamp lands granted to the State, and for the disposition of the proceeds:

SECTION 1. *The people of the State of Michigan enact*, That they adopt the notes of the surveys on file in the Surveyor-General's Office as the basis upon which they will receive the swamp lands granted to the State by an Act of Congress of September, 28, 1850.

SEC. 2. The minimum price of said lands shall be seventy-five cents per acre, and shall not be sold for less. All the moneys received from the sale of said lands shall be and remain a fund for the purpose of reclaiming said lands in conformity to the provisions of the grant.

SEC. 3. The Commissioner of the State Land Office shall have the control and supervision of said land, and of the sale thereof, and shall, as soon as the title vests in the State, cause the same to be sold at public auction at such times and in such quantities as he may think proper, and shall cause thirty days' notice of the time and place of the sale to be published in all the counties of the State in which there is a newspaper published. After the public sale under said notice the residue of said lands may be sold in the manner now provided by law for the sale of primary school lands, as near as may be, except as herein otherwise provided.

SEC. 4. On the sale of any of the said swamp lands, the Commissioner shall make out and deliver to the purchaser thereof a certificate containing a description of the same, the amount paid therefor, the date of sale, and the name of the purchaser, and setting forth that upon presentation thereof at the office of the Secretary of State, the purchaser shall be

entitled to a patent, to be executed by the Governor, for the lands therein described.

SEC. 5. All moneys accruing to said fund from the sale of the lands aforesaid shall be loaned to the State, and the interest arising from the same shall be paid by the State and become a part of the fund aforesaid.

SEC. 6. Said lands shall only be sold in the same legal subdivisions in which they shall be received by the State, nor shall any of said lands be subject to private entry until the same shall have been offered for sale at public auction, as herein above provided.

SEC. 7. The Commissioner of the Land Office is hereby authorized to procure all necessary books, maps or plats of such lands as may be required for the speedy and systematic transaction of the business of the office, and all proper charges for the same shall be paid out of the fund aforesaid.

SEC. 8. This act shall take effect immediately.

Approved June 28, 1851.

## APPENDIX NO. 2.

### No. 123.

An Act to provide for the selecting and locating the unselected deficiency existing in the quantity of lands due to the State of Michigan under the Act of Congress, approved May twentieth, eighteen hundred and twenty-six, and for any other land grant made by Act of Congress to this State.

SECTION 1. *The People of the State of Michigan enact*, That the Commissioner of the State Land Office be and is hereby authorized and directed to cause lands sufficient to supply the existing deficiency in the quantity accruing to this

State by virtue of the Act of Congress approved May the twentieth, eighteen hundred and twenty-six, the ordinance of admission July twenty-fifth, eighteen hundred and thirty-six, and any other land grant since made to this State by Act of Congress, to be selected and located in parcels in conformity with the provisions of the several acts making the same.

SEC. 2. This act shall take immediate effect.

Approved March 11, 1861.